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IN THE

Supreme Court of the United States

October Term, 1981

UNITED MINE WORKERS OF AMERICA,
and DISTRICT NO. 5 OF THE UNITED MINE
WORKERS OF AMERICA and ESTEL TAYLOR
Petitioners
vs.
KERRY COAL COMPANY
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDICES

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Petitioners, United Mine Workers of America, District No. 5 of the United Mine Workers of America, and Estel Taylor, respectfully pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Third Circuit filed in the above-entitled case on January 8, 1981, as to which an Order Amending Opinion was entered on January 28, 1981 and a further Order Amending Opinion was entered on February 5, 1981, and Petition for Rehearing and Suggestion for Rehearing en Banc was denied on February 9, 1981, affirming the denial of Petitioners' Motions for Judgment Notwithstanding the Verdict and for New Trial by the Opinion and Order of the United States District Court for the Western District of Pennsylvania filed on March 25, 1980.

QUESTIONS PRESENTED

1. Are labor organizations liable under Section 303 of the Labor-Management Relations Act of 1947 for alleged violations of Section 8(b)(4)(i, ii)(B) of that Act in the absence of clear proof or, at least, substantial evidence of the labor organizations having instigated, supported, ratified, or encouraged same?

2. Are labor organizations liable under pendent state tort claims, for alleged unlawful acts in the absence of clear proof that the labor organizations participated in, or actually authorized, or ratified such acts after actual knowledge thereof?

3. Under the common law of agency and the doctrine of respondeat superior, are labor organizations liable for all acts of their agents in the absence of clear proof that the labor organizations authorized or ratified such acts after actual knowledge thereof?

4. Where a Court of Appeals perverts the evidence as to a crucial and essential factor, is that not such a

departure from the accepted and usual course of judicial proceedings as to call for the exercise of the supervisory power of this Court?

5. When a Court of Appeals fails or refuses to effect and abide by the law of its own prior decision on the same matter, is that not such a departure from the accepted and usual course of judicial proceedings as to call for the exercise of the supervisory power of this Court?

PARTIES IN THE COURT BELOW

In addition to the Petitioners and Respondent in this Petition, other parties-Appellant in the Court below were Jerry (Gary) Ashton and Brian Short.

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OPINIONS BELOW

The opinion of the United States District Court for the Western District of Pennsylvania (Appendix A, pp. 1a-56a) is reported at 488 F.Supp. 1080. The opinion of the United States Court of Appeals for the Third Circuit (Appendix C, pp. 58a-80a), as amended by subsequent Orders (Appendix E, pp. 92a-94a, and Appendix F, pp. 95a-97a) is reported at 637 F.2d 957.

JURISDICTION

The opinion of the Court of Appeals was filed on January 8, 1981 (Appendix C, pp. 58a-80a), was amended by Order filed on January 28, 1981 (Appendix E, pp. 92a-94a), and was amended further by Order filed on February 5, 1981 (Appendix F, pp. 95a-97a). Petition for Rehearing and Suggestion for Rehearing en banc (Appendix D, pp. 81a-91a), timely filed, was denied on February 9, 1981 (Appendix G, pp. 98a-99a).

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves Section 8(b)(4) (29 U.S.C. §158(b)(4)), and Section 303 (29 U.S.C. §187) of the Labor Management Relations Act of 1947 (hereinafter the "Act"). They are printed in Appendix C, Footnote 1, pp. 60a-63a, infra.

STATEMENT OF THE CASE

1. Procedural History

This case arose in the District Court for the Western District of Pennsylvania from a Complaint filed by Respondent, Kerry Coal Company, on January 31, 1978, and an Amended Complaint filed by Respondent on February 13, 1978, alleging that the United Mine Workers of America (the International Union, hereinafter "UMWA"), Arnold Miller, District No. 5 of the United Mine Workers of America (hereinafter "District 5"), Louis A. Antal, Estel Taylor, Jerry Ashton, James Beachem, Brian Short, et al. had violated Section 8(b)(4) of the Act (Count I); alleging that Respondent was entitled to exemplary and punitive damages on account of the alleged violation of Section 8(b)(4) of the Act (Count II); alleging a conspiracy and acts against Respondent in violation of 42 U.S.C. §1985 (Count III); alleging a state tort claim of conspiracy to interfere with contractual relationships of Respondent (Count IV); alleging a state tort claim of interference with contractual relationships of Respondent (Count V); and alleging, generally, an entitlement to exemplary and punitive damages as punishment and a deterrent to others (Count VI). As a result of various motions, before and during trial, Counts II, III, and V were dismissed; all Counts were dismissed as to Arnold Miller and Louis A. Antal; and Count I was dismissed as to the remaining individuals.

Near the end of a lengthy trial, the District Court proposed certain special interrogatories to the jury. During the better part of one and one-half (1½) days, they were argued about between counsel and the District Court, were redrawn by the District Court, were deter-

mined in their ultimate form by the District Court (Appendix A, pp. 1a-6a, footnote 1), and were objected to by counsel for the UMWA and District 5 (Appendix D, p. 88a). The jury returned its verdict in the form of answering the special interrogatories to the effect of a verdict in the sum of $1,200,000.00 against the UMWA and District 5 on Count I; in the sum of $1,200,000.00 against the UMWA, District 5, Taylor, Ashton and Short on Count IV, all of which amount the jury determined to be included in the amount of its verdict on Count I; and made no award of punitive damages (Appendix A, pp. 1a-6a, Footnote 1).

Post-trial Motions filed by the UMWA, District 5, Taylor, Ashton and Short for Judgment Notwithstanding the Verdict and for New Trial were denied by the District Court (Appendix A, pp. 1a-56a and Appendix B, p. 57a), and timely appeal was filed to the Court of Appeals with bond in the amount of $1,500,000.00 being posted on behalf of the UMWA and District 5, no bond being required by the District Court for Taylor, Ashton and Short. Oral argument was had before a panel of the Court of Appeals, consisting of Gibbons and Rosenn, Circuit Judges, and Hannum, District Judge sitting by designation, on October 14, 1980. On January 8, 1981, the panel of the Court of Appeals filed its Opinion (Appendix C, pp. 58a-80a) affirming the denial of the post-trial Motions by the District Court. On January 20, 1981, the UMWA, District 5 and Taylor filed Petition for Rehearing and Suggestion of Rehearing In Banc (Appendix D, pp. 81a-91a) which was joined in by Ashton and Short. On January 28, 1981, the Court of Appeals filed an Order Amending its Opinion. (Appendix E, pp. 92a-94a.) On February 5, 1981, the Court of Appeals filed another Order Amending its Opinion. (Appendix F, pp. 95a-97a.)

On February 9, 1981, the Court of Appeals denied the Petition for Rehearing. (Appendix G, pp. 98a-99a.) Upon Motion, timely filed, the Mandate of the Court of Appeals was stayed. This Petition for Writ of Certiorari followed.

2. Factual Background

The UMWA is an international labor organization representing coal miners throughout the United States and Canada for purposes of collective bargaining. District 5 is a labor organization representing coal miners for collective bargaining in a lesser geographical area of the UMWA, namely southwestern Pennsylvania. Taylor was a District 5 Executive Board Member. Ashton and Short were members of Local Unions within District 5. Respondent is a non-union producer of coal from surface mines within the geographical area of District 5.

On December 6, 1977 the National Bituminous Coal Wage Agreement of 1974 (hereinafter the "Agreement") expired and a national strike began which extended to March 28, 1978 (hereinafter the "strike period"). The UMWA did not direct or authorize any picketing of non-union operations during the strike period. Considering that some of the members of Local Unions in District 5 might picket during the strike period, the Executive Board of District 5 met on November 30, 1977 along with Kenneth Yablonski, their attorney, and prepared guidelines for picketing of employers who were signatory to the Agreement, in the event that they operated, and guidelines for informational area standards picketing of other producers of coal which might operate. Taylor was assigned by District 5 to patrol picketing which might occur in that portion of District 5 wherein Respondent's operation was situated.

Statement of the Case.

The UMWA Organizing Department has certain employees, known as organizers, who have, as part of their function, the conducting of surveys of non-union coal mining operations to develop sufficient information from which it can be determined whether or not organizing should be attempted. The organizers have no authority to direct or assist in any picketing excepting where a survey has been completed, a determination to attempt organizing has been made, and an organizing campaign is in progress. At a time prior to the commencement of the strike period, there being a substantial number of unorganized coal-producing operations in District 5, the UMWA was requested to send an organizer to survey those unorganized operations and the UMWA assigned Jay Kolenc for that purpose.

Prior to the commencement of the strike period, the Organizing Department notified each of the organizers in writing that, in the event there should be a strike, they were directed to remain on their present assignment and were not to participate in any other activities. In the course of his survey work, Kolenc first met Ashton who told him that he (Ashton) wanted some information on setting up a picket line at Respondent's operation near Ashton's house. Kolenc told Ashton that he would see if someone from District 5 would provide such information, since Kolenc was not involved in such matters. Thereafter, Taylor contacted Ashton and arranged for several persons to picket peacefully near the entrance from the public road into one of Respondent's operations. This picketing commenced January 5, 1978 and continued only until January 9, 1978, during which period, in the course of his travels for the survey purposes, Kolenc stopped and talked to the pickets no more than twice and advised them that they must not interfere with ingress or egress

of any trains or other vehicles or employees going to or from Respondent's operation. Kolenc received directions from the Organizing Department transferring him to the Western Region in Denver, Colorado, and left the area of District 5 permanently on January 21, 1978.

Vernon Kerry, President of the Respondent corporation, testified he heard reports on his CB radio that there had been damage at a non-union site of a competitor (never identified) and, because of this, shut down his operations from December 12, 1977 to December 20, 1977. He stated further that on January 22, 1978 some of Respondent's equipment was damaged; that on January 25, 1978 a large number of unidentified persons and cars appeared on the road near the entrance to another site of Respondent and he shut down that operation for that day; and that on February 27, 1978 when he was making a delivery with several trucks to a customer, St. Joe Mineral Company, they were confronted by many unidentified persons near the customer's plant who threw rocks, and had difficulty making the delivery and leaving, but did. He was permitted to testify, over objection, that Respondent's employees were "nervous and afraid" during the strike period. Substantially, this was the total evidence of any "interruptions" of Respondent's operation.

Respondent had Price-Waterhouse do a work-up of damages for alleged lost profits based upon the premise that Vernon Kerry told him the Respondent could have sold all the coal it could have *produced* during the strike. (Appendix A, p. 39a and Appendix D, pp. 87a, 89a.) The alleged lost profits accounted for all but approximately

$10,000.00 of Respondent's alleged damages.[1] The Price-Waterhouse witness, Mr. Kilzer, testified that he proceeded on this basis and, from examination of Respondent's records, chose the month of February, 1978, exclusive of February 1, 1978 when Respondent went to State Court for an injunction, and exclusive of February 27, 1978 when the alleged St. Joe Minerals incident occurred. He said he chose February, 1978, with those exclusions, as a base period because it was a relatively uninterrupted period of operation according to Mr. Kerry. He admitted, however, that his examination of Respondent's records over a period of several years showed that it was much the largest volume sales period which Respondent had ever experienced. When confronted with the fact that Respondent's records also showed that the tonnage sold in that period exceeded the tonnage produced in that period by 19,000 tons, he considered that the excess must have come from stockpiles accumulated by respondent before commencement of the strike. He made a different calculation for alleged lost profits from lack of auger production because there was no auger production during the strike period. As to this, Mr. Kerry testified that he had scheduled auger production for some months during the strike period but the augering contractor did not come. It was not shown why. Nevertheless, for his calculation of alleged "lost profits—auger," Mr. Kilzer selected some months from a previous year for his base.

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1. It is to be noted that the total damage calculation amounted to $1,100,978.00 (Appendix A, p. 39a) whereas the verdict was in the sum of $1,200,000.00 (a difference of $99,022.00) with a specific refusal of the jury to award any exemplary or punitive damages. (Appendix A, pp. 5a, 6a, Footnote 1, part 18.)

Having selected the aforementioned period in February, 1978, Mr. Kilzer then selected certain purchasers of coal from Respondent in that period and designated them as a "representative customer mix," albeit that at least one of them had never purchased coal from Respondent before late in January, 1978. He then utilized the price per ton to these purchasers reduced by the cost of production per ton and came up with "lost profit," which he then applied on *a daily basis throughout the entire strike period,* rather than limiting its application to the minimal periods of alleged interruption shown by the evidence as discussed hereinbefore. He justified this on the basis that Mr. Kerry had told him Respondent's operation was interrupted "every day of the strike."

When asked what customers and amount of orders for coal Respondent had or could have had in December, 1977, and January and March, 1978 which were equivalent to the so called "customer mix" constructed for February, 1978, Mr. Kilzer didn't know of any. Neither did Mr. Kerry. Mr. Kilzer merely answered that, if it hadn't been the customers and the amounts used in the February, 1978 "customer mix" it would have been some other. Further, there was no showing of what the price per ton would have been on the orders which Respondent didn't have in December, 1977, and January and March, 1978.[2] Finally, there was no evidence offered to show what amount of coal Respondent *could have produced* during the strike period through continuous, uninterrupted operation.

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2. It is to be noted that the price per ton was widely variant as between different customers in the so-called "customer mix" for the same quality coal, i.e. from $17.50 per ton to $32.50 per ton.

REASONS FOR GRANTING THE WRIT

A. The Court of Appeals Decided a Federal Question in a Manner Conflicting with Applicable Decisions of This Court and Conflicting with Decisions of Another Court of Appeals

1. The Section 8(b)(4) Claims

Count I of Respondent's Complaint was based on alleged violation of Section 303 of the Act and, therefore, had as its gravamen alleged violation of Section 8(b)(4) of the Act. Only subpart (B) of Section 8(b)(4) is pertinent for consideration in this case. Reduced to its relevant essentials, it provides that it shall be an unfair labor practice for a labor organization or its agents:

> 1. To induce or encourage any employee to engage in a strike or to induce any employee to refuse to use or otherwise handle goods or perform services where an object is forcing any person to cease using, handling or dealing in the products of any other producer, or to cease doing business with any other person; or
>
> 2. To threaten, coerce or restrain any person where an object is forcing any person to cease using, handling or dealing in the products of any other producer or to cease doing business with any other person.

During argument on the Motions of UMWA and District 5 for Directed Verdict on Count I (they being the only Defendant parties then included therein) the District Court stated:

> THE COURT: Well, as I see it, we are not in the secondary boycott situation. I agree with you that the Plaintiff hasn't shown a secondary boycott situation. It seems to me that what is here involved is proof by the Plaintiff that both the International and the District set out to prevent the movement of all coal in the District 5 area and that that is, in fact, what happened.

a. *The International Union*

As to the UMWA, the only possible connection with any activity pertaining to Respondent would have to be established through some act of Kolenc, authorized or ratified after actual knowledge. Virtually all evidence regarding Kolenc was produced by Respondent in its case and is binding upon Respondent. The testimony of Taylor, called as for cross examination by Respondent, established that Kolenc had no part in any decision to picket Respondent; that Kolenc had no authority to direct anything in District 5; and that Kolenc stopped on a "couple" of occasions at the picket line which Taylor had set up and once told them they should not interfere with ingress or egress of any persons or vehicles. By other evidence in the case, it is established that Kolenc and all of the organizers were given written direction from the UMWA Organizing Department to stay on their present assignments and not participate in any other activities; that Kolenc had no authority to authorize or direct any picketing; and that his only assignment was to make surveys of unorganized coal mines so that it could be determined, at a later time, whether an attempt should be made to organize any of them.

The circumstances pertaining to the UMWA, Kolenc and Respondent are virtually identical to those in *Buckeye Power, Inc. v. Utility Workers Union,* 607 F.2d 759 (6th Cir. 1979) wherein local union members were conducting picketing at places where it was alleged to comprise secondary activity. An officer of the national union came to the picket line and had discussions with the pickets. When asked, he advised the local union officers that they should not picket in some of the places where they were, but took no action and did nothing to stop them. There, the Court of Appeals for the Sixth Circuit held that the national union was not liable for the activities of the local union or its members which it did not authorize or ratify and that the statutes upon which the action there was based (Sections 303 and 8(b)(4)(i)(ii)(B)) contained no language equating *inaction* to inducing, acquiescing in, or encouraging a secondary boycott. To the same effect is *Steelworkers v. Lorain,* 616 F.2d 919 (6th Cir. 1980).

The Court of Appeals in this case held it permissible to *infer* "that Kolenc instigated, supported, ratified, or encouraged the activity complained of" and to *infer* that, in so doing, he was acting as the agent of the UMWA. (Appendix C, pp. 70a-72a.) This is in conflict with the decisions in *Carbon Fuel Co. v. United Mine Workers,* 444 U.S. 212 (1979); *Steelworkers v. Lorain, supra; Buckeye Power, Inc. v. Utility Workers Union, supra;* and *United Mine Workers v. Coronado Coal Co.,* 259 U.S. 344 (1922). At the very least, any showing of instigation, support, ratification or encouragement must be by "substantial evidence," not *inference, United Mine Workers v. Coronado Coal Co., supra,* and, at the very most, it must be shown by clear, unequivocal and convincing proof, *United Mine Workers v. Gibbs,* 383 U.S.

715 (1966) and *Steelworkers v. Lorain, supra.* "Inference" does not fall within the range of those extremes.

There are only two (2) types of agency authority recognized in law—actual and apparent—and in the strict sense, neither can be *inferred.* Each type has its genesis in and flows from the principal, either through clear expression and grant of actual authority by the principal or by conduct of the principal which justifiably leads others to believe that authority exists. See *William B. Tanner Co., Inc. v. WIOO, Inc.,* 528 F.2d 262, 266 (3rd Cir. 1975). Here, as to the UMWA vis-a-vis the Respondent, neither Kolenc nor any other person in this case fits those categories, even if it had been shown by "substantial evidence" that Kolenc instigated, supported, ratified or encouraged the activity complained of.

Subsequent to the pronouncement in *United Mine Workers v. Coronado Coal Co., supra,* and the pronouncement in *Coronado Coal Co. v. United Mine Workers,* 268 U.S. 295 (1925), Congress passed the Norris-LaGuardia Act, 29 U.S.C. §101 et seq., and, in Section 6 thereof (29 U.S.C. §106), provided that no union shall be held liable for unlawful acts of its officers, members or agents, except upon clear proof of actual participation in, or actual authorization of such acts, or of ratification of such acts after actual knowledge thereof. Thereafter, by enactment of Sections 301 and 303 of the Labor Management Relations Act of 1947, Congress followed the reasoning of Chief Justice Taft in the *Coronado Coal Case, supra,* posturing corporations and labor organizations in like positions as to vicarious liability, by applying to both the common-law agency test, and with it the doctrine of *respondeat superior. Carbon Fuel Co. v. United Mine Workers, supra.* However, the com-

mon-law doctrine of *respondeat superior* is not the equivalent of absolute liability and has never been held to render the principal (master) an insurer against *all* acts of an agent (servant). For example, if an agent commits an intentional tort, such as a battery upon some person, no vicarious liability attaches to the principal, there being no express authority and, certainly, no possibility of apparent authority for such an act.

In the instant case, Respondent produced evidence, through the testimony of Taylor, that Kolenc had no authority to direct anything in District 5 and had no part in the picketing of Respondent. Since Respondent offered no contradiction, since the testimony was not inherently improbable, and since it was not a mere guess, Respondent is bound by that. See *Slater v. Erie-Lackawanna Railroad Company,* 300 F.Supp. 1 (W.D. Pa. 1968), *aff'd.* 411 F.2d 1015 (3rd Cir. 1969). Further testimony by Sam Church, President of the UMWA, established the limited authority or scope of employment of Kolenc, to survey unorganized coal mining operations with a view toward determining the reasonableness of attempting to organize them at a later time. Documentary evidence (Defendants' Exhibit "G") established that Kolenc was instructed by the UMWA to remain on his assignment and not become involved in other activities. Even if all of that evidence were disbelieved, an unsupported and diametrically opposed *inference,* to the effect that Kolenc had authority to picket, threaten, coerce or commit unlawful acts is not permitted, since *inference* cannot arise from a vacuum. If Kolenc had done any of those things, of which there is no evidence in this case, they would have been intentional acts without indicia of authority, express or apparent, and the

UMWA could not be vicariously liable absent subsequent ratification.

b. *The District*

As to District 5, it was shown that there was authorization given by it to Taylor to conduct informational picketing in accordance with specific guidelines developed and printed by District 5 (Appendix A, pp. 9a, 10a and Plaintiff's Exhibit No. 13), which activity is protected by the Act and the Constitution of the United States. It was shown also that Taylor did conduct picketing at one of Respondent's sites from January 5, 1978 to January 9, 1978. Other than one occasion, when a train stopped for a relatively short period through voluntary action of the train crew, there was no showing that there was any cessation of ingress or egress, or of doing business with any other person, or of producing, processing, handling or dealing in the products of Respondent or any other person.

Both the District Court and the Court of Appeals jumped over the *"where an object thereof is"* language of Section 8(b)(4)(B) of the Act and landed upon *where an effect thereof was*. Then, by inference, the leap was made to *an object thereof must have been*. That is not only a non sequitur but, in almost every instance, would abrogate the express protection of the Act and the United States Constitution. That is to say, the most antiseptic informational campaign would be transformed immediately into an unfair labor practice by a chance happening which was totally beyond the control of and not sought by the labor organization. It ought not to become established, by a judicially constructed inference, that Congress intended the clear language of Sec-

tion 8(b)(4)(B) of the Act to negate the express protection preserved by Congress in the second proviso to Section 8(b)(4) of the Act, or that such inference can frustrate the paramount protection of the United States Constitution. Further, these gymnastics of inference are in conflict with the clear proof requirement of *United Mine Workers v. Gibbs, supra, Buckeye Power, Inc. v. Utility Workers Union, supra,* and *Steelworkers v. Lorain supra.*

2. THE STATE TORT CLAIMS

Count IV of Respondent's Complaint was based upon the alleged tortious interference with contractual relations between Respondent and others by alleged illegal and violent acts of Petitioners in violation of the law of Pennsylvania. Liability of Petitioners thereon was upheld by the Court of Appeals as being grounded on the same facts as the Section 8(b)(4) claims of Count I. (Appendix C, pp. 73a, 74a.) Assuming that the entertaining of these pendent claims was discretionarily permissible, their proof, nevertheless, relates back to the same inferences addressed hereinbefore and, therefore, does not satisfy the clear proof requirements of Section 6 of the Norris-LaGuardia Act. The Court of Appeals has decided this question in conflict with *United Mine Workers v. Gibbs, supra, Steelworkers v. Lorrain, supra,* and *Buckeye Power, Inc. v. Utility Workers Union, supra.*

B. The Court of Appeals Has So Far Departed from the Accepted and Usual Course of Judicial Proceedings and Has So Far Sanctioned Such a Departure by the District Court as To Call for the Exercise of This Court's Power of Supervision and the Court of Appeals Has Rendered a Decision in Direct Conflict with Its Prior Decision on the Same Matter.

These questions pertain to the matter of the damages as to all Petitioners and are complicated by the fact that the Court of Appeals perverted the evidence and, even then, rendered a decision in conflict with its own decision in *Tanner v. WIOO, Inc., supra.* As mentioned hereinbefore and in Appendix D, p. 87a, Respondent's entire theory of damages was founded on the premise that it "could have sold all the coal it could have produced" by uninterrupted operation through the strike period. This was twice stated by Mr. Kilzer, Respondent's expert witness from Price-Waterhouse, as having been told him by Mr. Kerry, and it was the foundation for his work-up of alleged damage. Then, as earlier noted, Mr. Kilzer chose the month of February, 1978 (exclusive of the 1st and 27th day), constructed his "customer mix" of four (4) purchasers, at least one (1) of which had never purchased coal from Respondent before late in January, 1978, and developed the net profit per ton from surface mining for the chosen twenty-six (26) day period on the basis of *sales.* Then he calculated the net profit per ton from auger mining, utilizing a totally different period of months from outside the strike period. Finally, he applied the so-calculated net profits per ton to *assumed* equivalent tonnage on each of the eighty-five (85) other days, exclusive of the above-mentioned base

period, during the strike,[3] on the basis of assumed equivalent sales to an *assumed* equivalent "customer mix" for each of the said days. The shortfall of this procedure was obvious. There was no showing of how much coal Respondent *could have produced* and, therefore, the keystone of the theory was totally missing. The figures used by Mr. Kilzer for the base period in February, 1978 were *tons sold,* not *tons produced,* and afford no assistance to fill this evidential void, in that the records of Respondent in evidence showed that it sold 19,000 tons more than it produced in February, 1978.

Although this problem was raised in the District Court and it was aware of the faulty premise (Appendix A, p. 39a), it did not deal with it, other than by use of the inapplicable platitude that "it is not necessary to prove the exact amount of the damage suffered. It is sufficient if the evidence supports a just and reasonable approximation." (Appendix A, pp. 41a, 42a.) The matter was raised again in the Court of Appeals and, peculiarly, that Court perverted the stated premise into "it could have sold . . . all the coal it could *ship.*" (Appendix C, p. 76a.) No such theory is set forth at any place in the evidence, or in the Opinion of the District Court. However, when this was called to the attention of the Court of Appeals (Appendix D, p. 87a), it failed to correct the

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3. Mr. Kilzer applied his figures for net profits per ton from auger mining to the months of January, February and March, 1978, on the premise that Mr. Kerry had told him no augering was scheduled in December, 1977, even though Mr. Kerry testified that augering was scheduled throughout the entire strike period but the augering contractor did not come. This discrepancy was never cleared up, nor was there any evidence as to why the augering contractor didn't come.

misstatement. (See Appendices E and F.) The seriousness of this is, simply, that if the keystone of the theory had been as the Court of Appeals misstated it, the damages calculated by Mr. Kilzer would have been consistent with it, though invalid for the reasons mentioned hereinafter.

In its own decision in *Tanner v. WIOO, Inc., supra,* the Court of Appeals determined that there was no evidence on the record that the plaintiff had potential customers for the product, nor any evidence of a price at which it could have sold the product, and stated:

> Although the record reveals the prices at which WIOO offered to sell spots during various time periods, that evidence alone cannot suffice to meet Tanner's burden of proof. First, the record is barren as to whether WIOO actually sold spots during the relevant contract periods at its published sales prices. Second, and of more importance, the record is completely silent as to whether Tanner could sell spots at the same price listed by WIOO. Although WIOO's sales price may be relevant in the proof of Tanner's damages, it does not provide the "hard evidence" required for a calculation of Tanner's damages with "reasonable certainty".
>
> (Id. at 272)

In the instant case the situation is identical, in that Respondent failed to show that it had any orders for coal, or customers to whom it "could have sold" such coal, or the price at which it "could have sold" coal during the month of December, 1977 and the months of January and March, 1978.

Though the decision in *Tanner v. WIOO, Inc., supra,* was raised in the District Court as the applicable law of damages in the Third Circuit, the District Court took no notice of it. (See Appendix A.) It was raised again on appeal to the Court of Appeals and again in the Petition for Rehearing (Appendix D, p. 89a), but the Court of Appeals either failed or refused to consider it. Petitioners are entitled to the benefit of the law of the Circuit and that law is decisive of this case in favor of Petitioners. For the Court of Appeals to fail or refuse to apply that law and to sanction the District Court's failure in the same regard constitutes a lack of due process and is such a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

C. The "Two-Court Rule" Does Not Apply

The so-called "two-court rule" is not applicable to this case because: (1) upon review of virtually identical facts, the decisions of the Sixth Circuit and the Third Circuit are in conflict; (2) the Court of Appeals did not concur in the finding of the District Court that the basis for Respondent's damage calculation was that "Respondent could have sold all the coal it could have *produced*" but, rather, the Court of Appeals constructed its own "fact" to the effect that the basis was that "Respondent could have sold all the coal it could *ship*"; and (3) neither the District Court nor the Court of Appeals considered the failure of Respondent to show orders or customers or prices for coal during December, 1977 and January and March, 1978, to which void each Court should have applied, but did not even mention, the law of the Circuit as enunciated in *Tanner v. WIOO, Inc., supra.*

CONCLUSION

The questions discussed herein were wrongly decided by the Court of Appeals. They are important issues in Federal Law involving conflicts between the Circuits and departure from the accepted and usual course of judicial proceedings which should be settled by this Court.

Respectfully submitted,

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APPENDIX

Appendix A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

KERRY COAL COMPANY, Plaintiff v. UNITED MINE WORKERS OF AMERICA, DISTRICT NO. 5 OF THE UNITED MINE WORKERS OF AMERICA, JERRY ASHTON, ESTEL TAYLOR, JAMES BEACHEM, BRIAN SHORT, JOHN DOE, RICHARD ROE, and all others acting in concert with them or otherwise participating with them or acting on their behalf, Defendants	Civil Action No. 78-108

Opinion

SNYDER, J.

This matter is before the Court on the Defendants' Motions for Judgment Notwithstanding the Verdict and for New Trial. The Motions will be denied.

I. THE PROCEDURAL BACKGROUND

Kerry Coal Company ("Kerry Coal") brought suit against the United Mine Workers of America ("International"), District No. 5 of the United Mine Workers of America ("District"), Estel Taylor, District No. 5 Board Member, James Beachem, Brian Short and Jerry (Gary) Ashton, Members of the United Mine Workers, and the matter was tried to a jury on three counts of a six count complaint. The jury answered special interrogatories[1]

1. The Special Interrogatories and Answers thereto were:

and awarded the Plaintiff compensatory damages in the amount of $1,200,000, against all Defendants except James Beachem.

Count I of the Complaint charged the International and the District with a violation of Section 8(b)(4) of the Labor Management Relations Act, 29 U.S.C. §158(b)(4), which makes it unlawful for a labor orga-

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Footnote *(continued)*

Count I

A. As To The Employees

1. Did the United Mine Workers of America (International) induce or encourage one or more employees of the Kerry Coal Company, or of the trucking companies hauling for Kerry Coal Company, or of the Railroad, to refuse to process, transport or handle Kerry coal?

Answer Yes

2. Was an object of the aforementioned conduct by the International to require or force the employer, Kerry Coal Company, to cease doing business, or the trucking companies hauling Kerry coal, or the Railroad to cease processing, transporting, or handling Kerry coal?

Answer Yes

3. Were the actions of the International a proximate cause of damage to the Kerry Coal Company?

Answer Yes

4. Did the United Mine Workers of America, District No. 5, induce or encourage one or more employees of the Kerry Coal Company, or of the trucking companies hauling for Kerry Coal Company, or of the Railroad, to refuse to process, transport, or handle Kerry coal?

Answer Yes

nization or its agents "to engage in, or to induce or encourage any individual employed by any person engaged in commerce . . . to engage in a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities", or "to threaten, coerce, or restrain any person engaged in commerce" where an object thereof is a "secondary boy-

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Footnote *(continued)*

5. Was an object of the aforementioned conduct by District No. 5 to require or force the employer, Kerry Coal Company, to cease doing business, or the trucking companies hauling Kerry coal, or the Railroad to cease processing, transporting, or handling Kerry coal?

Answer Yes

6. Were the actions of District No. 5 a proximate cause of damage to the Kerry Coal Company?

Answer Yes

B. As To The Employers Or Customers

7. Did the United Mine Workers (International) threaten, coerce, or restrain Kerry Coal Company, or the trucking companies which hauled Kerry coal, or the customers of Kerry Coal Company, to cease doing business with Kerry Coal Company?

Answer Yes

8. Were these acts of the United Mine Workers (International) done with an object, purpose, or intent to require or force Kerry Coal Company to cease doing business with any other person?

Answer Yes

9. Were the actions of the International a proximate cause of damage to the Kerry Coal Company?

Answer Yes

cott". The Act provides for money damages, including the costs of suit. 29 U.S.C. §187.

Count IV was a pendent state claim against the International, the District and the Individual Defendants for tortious interference with business relationships.

Count VI, pertaining to punitive damages arising from the allegations of Count IV, was sent to the jury which declined to make such an award.

In essence, the Plaintiff contended at trial that there was a pattern of unlawful picketing, violence, and

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Footnote *(continued)*

10. Did the United Mine Workers, District No. 5, threaten, coerce, or restrain Kerry Coal Company, or the trucking companies which hauled Kerry coal, or the customers of Kerry Coal Company, to cease doing business with Kerry Coal Company?

Answer Yes

11. Were these acts of the United Mine Workers, District No. 5, done with an object, purpose, or intent to require or to force Kerry Coal Company to cease doing business with any other person?

Answer Yes

12. Were the actions of District No. 5 a proximate cause of damage to the Kerry Coal Company?

Answer Yes

13. We award as compensatory damages to the Kerry Coal Company the sum of $1,200,000.00.

Count IV

14. Has Kerry Coal Company established by clear proof participation in or ratification of violent acts directed against the Kerry Coal Company with regard to its contractual or business relationships, which were a substantial factor in directly causing damage to the Kerry Coal Company, on the part of:

intimidation engaged in by the Officers and Agents of the International, the District, and the various individuals named as defendants, aimed at disrupting and halting the nation's coal supply during the winter of 1977-78 (including Kerry Coal, a non-union operation) to bring about the acceptance of a new contract for the United Mine Workers of America.

The motions presently under consideration here generally allege that there was insufficient evidence to sup-

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Footnote *(continued)*

a. United Mine Workers of America (International) Yes

b. United Mine Workers of America District No. 5 Yes

15. Has Kerry Coal Company established by clear proof participation in violent acts directed against the Kerry Coal Company which were a substantial factor in directly causing the damages as claimed, on the part of any of the following individuals?

a. Estel Taylor Yes

b. Jerry Ashton Yes

c. James Beachem No

d. Brian Short Yes

16. We award as compensatory damages to the Kerry Coal Company the sum of $1,200,000.00.

A. Of the above amount, $1,200,000.00 (all) is included in Question 13.

17. In addition to compensatory damages awarded, do you wish to award punitive damages?

Answer No

18. We award as punitive damages to the Kerry Coal Company the sum of $0 (none), against:

port the verdict; that the damage award is inconsistent with the special interrogatories and against the weight of the evidence; that withholding of documents by the Plaintiff severely and irreparably prejudiced the International and the District; that the admission of certain evidence was severely and irreparably prejudicial; that the Court erred in allowing certain testimony; that the Court improperly questioned witnesses; and that the Court erroneously instructed the jury with respect to the damage award.

Defendants Ashton and Short filed an Amended Motion for Judgment Notwithstanding the Verdict or for New Trial, claiming that the verdict was excessive as a matter of law; that the Trial Court abused its discretion in exercising pendent jurisdiction; and that it was error for the Court not to direct the jury to apportion the damage award.

The International and the District filed a Supplemental Motion for New Trial claiming that the Court erred in admitting certain exhibits into evidence, in refusing to grant their Motion for Mistrial made during the closing arguments, and in refusing to grant their Requests for Points for Charge and Supplemental Points for Charge.

Footnote *(continued)*

United Mine Workers of America (International) No

United Mine Workers of America, District No. 5 No

Jerry Ashton No
Estel Taylor No
James Beachem No
Brian Short No

Appendix A.

II. The Scenario

The evidence, viewed most favorably to the Plaintiff, indicated that Kerry Coal was a non-union surface coal operation, shipping its coal by rail and truck to industrial and domestic customers in Pennsylvania and Ohio. During the national coal strike by the United Mine Workers, from December 6, 1977 to March 16, 1978, Kerry Coal was operating five sites in Butler, Beaver and Lawrence Counties, Pennsylvania.[2]

The District had a membership of 15,000 and jurisdiction over Washington, Allegheny, Westmoreland, Butler, Mercer and Venango Counties, Pennsylvania. It was split geographically into four Sub-Districts; each Sub-District elected a member to the District Executive Board. Estel Taylor was the Executive Board Member for Sub-District One and District President Louis Antal assigned him to the Enon Valley area (which included Kerry Coal's sites) for the strike.

In November 1977, with a nationwide strike appearing inevitable, and apparently pursuant to a well thought out plan, District President Antal asked International President Arnold Miller to send in one of the International's Organizers, Thomas Pysell, to do a "survey" of the Western Pennsylvania coal fields. In particular, he wanted the non-union coal strippers "surveyed" because "our members kept coming back to us and raising heck that there were all kinds of strip mines popping up over night. And I couldn't go out and look at that, I didn't have the time." (T.237) Mr. Pysell was given responsi-

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2. The five sites were: "Perkins" in Franklin Township, Beaver County; "Leonhardt" and "Ketterer" in Lawrence County; and two in Muddy Creek Township, Butler County.

bility for such a survey in Western Pennsylvania by the Organizing Department of the International. (T.208) Pysell left the area prior to the beginning of the strike, and was thereafter replaced by Jay Kolenc, also an International Organizer. The expense vouchers of Kolenc, P.Ex. 49, indicate that on November 25, 1977 Kolenc met with Pysell to check non-union mines. Kolenc remained in the area, surveying non-union mines, until January 21, 1978.

Steve Segedi, a District Executive Board Member, recalled seeing Pysell and Kolenc in the District offices just prior to the strike, and Segedi, along with John Chach, Estel Taylor and Peter Sabo, other District Board Members, lunched with Pysell and Kolenc. (T.1476, 1502) The expense vouchers of Kolenc, P.Ex. 49, reflected meetings with District Officers on several occasions, and the telephone records of Estel Taylor, P.Ex. 100C, showed phone calls to Kolenc at the Holiday Inn in Beaver Falls as early as December 6, 1977.

Under date of November 28, 1977, President Antal notified Kerry Coal and its President, Vernon Kerry, as well as every other non-union coal company within the District, that (P.Ex. 11):

> "We are aware that you are not maintaining area wage and benefits standards, thereby obtaining an unfair competitive advantage. We demand that you immediately raise your current standards to match those prevailing in the coal mining industry in this area.
>
> We expect to hear from you that you have raised your standards as soon as this has been accomplished. If, in fact, we do not hear from you concerning this matter, we will assume that it is

not your intention to raise your standards at this time.

Please reply to me at the above address."

These letters were sent without any knowledge of the wage and benefits standards paid by Kerry Coal and the others except, of course, that they were non-union operations.[3]

On November 30, 1977, a meeting of the District Executive Board was called by President Antal to make preparations for the strike and to draw up "guidelines" for both "strike" and "informational" pickets. Kenneth Yablonski, the attorney for the District, was also present at this meeting and aided in the preparation of the guidelines. Specifically, informational picketing at independent non-union mines was discussed and guidelines presented.[4] The District arranged for the informational

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3. Kerry Coal, in fact, had a profit sharing plan, full paid benefits for medical to $250,000, and a long record of no layoffs. (T.464)

4. These read as follows (P.Ex.13):

"INSTRUCTIONS FOR INFORMATIONAL PICKETS

Distributed by the United Mine Workers of America for use by its authorized, informational pickets.

As a picket for the United Mine Workers of America you are issued the following instructions concerning informational picket duty. They must be followed to the letter or the union may suffer serious legal consequences:

1. The only picket signs to be used are those provided by the United Mine Workers of America.

2. All informational pickets while engaged in informational picketing should carry the picket signs provided by the United Mine Workers of America.

pickets to receive $3.00 for meals and, if they drove, 20¢ per mile.[5]

Between December 6[6] and 12, 1977, Vernon Kerry observed men in vehicles driving around his sites, apparently as "surveillance crews". Then, on the morning of December 12th, he received reports by CB radio and by telephone that several thousand dollars worth of damage had been done to a non-union competitor's site

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Footnote *(continued)*

3. You are to picket only where an authorized representative of the United Mine Workers of America has directed you to perform your picket duty.

4. If you are asked any questions concerning your picket activity, you should say *nothing!* You should simply point to the picket sign and refer all questions to the United Mine Workers of America.

5. Picketing *must* be conducted in a *peaceful manner.* Do not speak to any employees entering or leaving the picketed premises. Do not attempt to stop anyone. You are there to publicize the fact that this coal mine operator is destroying area standards by paying substandard wages and benefits.

DO NOT SAY ANYTHING TO ANYONE
DO NOT SHOW THESE INSTRUCTIONS TO ANYONE"

It is interesting to note that picketing was to be carried on only where an authorized representative of the United Mine Workers directed.

5. The District's 1977 Labor Management Report showed payments to pickets at non-union operations of $5,000 in December, and in 1978, $37,833 was paid for picketing of non-union operations in January, February and March.

6. Vouchers for travel by United Mine Workers members revealed five cars containing 16 people. Four

(later identified as the Veon site) and, for safety reasons, he shut down all Kerry Coal sites on the morning of December 13th, with the exception of some maintenance crews.

After receiving numerous calls for coal from his customers, Vernon Kerry resumed operations on December 20, 1977. It was not long before picketing activity began and, with the activity, acts of intimidation to his employees. Roofing nails were thrown across the entrances to some of the Kerry Coal sites (10 pounds of nails were picked up, T.344), and there was general chaos in the coal fields. On December 27, 1977, Gary Ashton and James Beachem, during the course of scouting activity, threatened Vernon Kerry that if he did not shut down, they would bring in 200 men to wreck his equipment, and Beachem added, "we can do this with one phone call." (T.341, 566) In addition, Ashton, who lived near Kerry Coal's tipple site, picketed the railroad crossing with a sign "UMW on Strike—No Contract—No Work" whenever a train came to pick up coal, and the train would leave. (T.343, 568). This effectively stopped Kerry Coal from shipping coal to its customers. Prior to that time, Kerry Coal had shipped coal on a daily basis (T. 341) and 80% of its coal was shipped by rail.

In the beginning, picketing was not continuous but it later became 24 hours a day. (T.343) During the picketing, Vernon Kerry recognized Jay Kolenc, the International Organizer, at the site on more than one occasion.

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cars traveled the same 222 miles, and one traveled 126 miles, on December 6, 1977 in Western Pennsylvania. (P.Ex. 44-1, 2, 3, 4, 5)

Appendix A.

It was shortly after Christmas and after his encounter with Vernon Kerry, Gary Ashton testified, that he learned Kerry Coal was not going to be closed and called his Local President, Edward Lytle, to obtain help in setting up pickets at Kerry Coal. Lytle said he would get in touch with someone and let him know. The next day, Lytle called and told Ashton he would bring someone to meet him. Ashton stressed he wanted to set up pickets because the strip mines were running. A meeting was arranged at a firehall where Ashton, Beachem and Lytle discussed briefly with Jay Kolenc setting up pickets at Kerry Coal. Kolenc told them there were papers and instructions from the District and that someone would deliver these to him. Later, Estel Taylor, District Board Member, arranged a second meeting at Felix's Bar in Zelienople, some six or seven miles from Kerry Coal's Franklin Township site. Brian Short appeared at this meeting, and Taylor asked Ashton to "scout" the Kerry Coal operation (Ashton described scouting as seeing what operations were running and who was hauling coal where). After Ashton scouted Kerry Coal, he reported to Taylor that the sites were still operating and another meeting was called at Felix's Bar in which Short and Taylor participated. Taylor gave out the instructions drawn up at the November 30, 1977 meeting (see Footnote 4), and picketing then proceeded on a 24 hour basis from January 5 to January 9, 1978. Ashton remembered seeing Kolenc on this picket line.

During the picketing, the pickets harassed independent truckers bringing the coal to the tipple. On one occasion the pickets stopped a train trying to get into the site, as the train crew refused to cross the picket line.

Brian Short, a past Local President, was a close friend of Estel Taylor and became involved in picketing operations at Kerry Coal, as well as in scouting activities. Prior to establishment of a formal picket line at Kerry Coal (described by Brian Short as one for a period of 24 hours), informational pickets were put at Kerry Coal at Taylor's request. Short said that on one occasion they stopped, milled around the railroad siding, and left. Short considered this to be only informational picketing. On another occasion, Vernon Kerry observed Brian Short's vehicle, a Ram Charger, near the gas pumps on his property. At this time, Short threatened physical violence if Vernon Kerry did not shut down his operations.

Both Short and Taylor recalled Jay Kolenc being on the picket lines. Full time pickets continued until January 9, 1978 and were then withdrawn.

On January 20, 1978, Taylor, Short, and two other United Mine Worker members, Sewoc and Lucas, drove past Kerry Coal's site. Short said he thought Kerry Coal was still working. They drove past Kerry Coal into the Beaver Falls area and breakfasted with Jay Kolenc.

On January 22, 1978, a Sunday morning, at about 8:30 A.M., Vernon Kerry was called to his tipple site because of damage done to his equipment during the night. When he arrived he observed extensive damage to a dragline, three bulldozers, a pan scraper and a fuel tank.[7] Vernon Kerry described the scene as follows (T.351):

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7. The dragline had a 120 foot long boom with a 7 yard bucket attached capable of picking up 40,000 pounds of overburden at one time, and costing $750,000. The bulldozers weighed about 50 tons each and had 16 foot wide by 6 foot high blades on the front. The pan was used for removing and replacing the top soil.

"Q. Tell the jury what you saw.

A. Broken windows, smashed turbochargers, fuel lines broken, radiators had holes punched in them. Most of the destruction was done with bars or sledges. The radio was destroyed—the two way radio. The controls were smashed. The antifreeze and the fuel was all over the ground. They had broken lines on the fuel truck and just left the fuel run on the ground. The controls inside of the motor—the motor—the motor—the injector lines on the dragline was smashed. Air cleaners were broken. Most of the controls were broken.

Q. Did you see where any foreign substances had been put into your equipment?

A. At various places on the machinery there is places where oil or fuel can be added to maintain the necessary levels to operate. Inside those areas, you could see where sand and mothballs had been placed. Dirt and sand were placed in the radiator caps where the radiators were completely filled."

At the scene, Vernon Kerry observed tire marks in the new fallen snow which he identified as being made by Brian Short's Ram Charger. He went in search of Short and when he encountered him in an apartment house parking lot in Library, Pennsylvania, Kerry accused Short of "being seen last night". Short's only reply was, "I don't think so". (T.592)

Some replacement parts were not immediately available and the Kerry equipment was not operational for over two months. It was also necessary to take produc-

tion men away from their usual work in order to perform the repairs, and Vernon Kerry hired private security guards.

On January 25, 1978, twelve carloads of pickets came to the Kerry Coal tipple site and, standing shoulder-to-shoulder, completely blocked access to the premises. Vernon Kerry called the state police and while he was waiting for their arrival, two of the pickets came into his office, identified themselves as members of the United Mine Workers, and told him to stop shipping industrial or electrical utility coal during the remainder of the strike. Kerry agreed to do so and testified (T.346):

> "... It was a wise decision on my part because within five minutes there was a caravan came past my office in a show of force. There were some 80 cars in the caravan in addition to the cars that were already at my site."

By the time the state police arrived, the pickets had gone. The police told Vernon Kerry to get his men out of there, expecting the pickets to return. Within about five minutes, the pickets were back but, when they saw the police, only shouted and made gestures.

The coal trucks were followed on many occasions and at one attempted delivery at St. Joe Mineral Company, a regular Kerry Coal customer, on February 27, 1977; pickets threw rocks and damaged these trucks. After the coal was dumped they could not leave because the pickets were swarming at the exit. They finally escaped when they were escorted by the police. This incident ended deliveries to St. Joe Mineral for the period of the strike.

Estel Taylor, District Executive Board Member, acknowledged he had been given the Enon Valley area

by District President Antal (the area of Kerry Coal's operations). His calendar of activities showed that he was in that area on January 26, 1978 "performing legitimate official duties".[8] He denied being in the Kerry Coal area during any relevant period of time, although he had been paid by the District for this particular date, and his voucher showed he had been in Zelienople. He acknowledged knowing Jay Kolenc, seeing him at the Kerry Coal site, and meeting him through Ashton to set up the pickets at Kerry Coal, thus contradicting his own testimony.

A. *The Union's Testimony In Plaintiff's Case*

Much of the Plaintiff's case was established after lengthy pretrial depositions by calling various union members on cross examination. Vernon Kerry's testimony was thus strongly corroborated and many details added.

The first of these witnesses was Michael Encrapera, who testified that before the strike began, he was asked by District President Antal to become the administrator of a legal defense fund (CMLDF), the purpose of which was to pay fines for the people who would get in trouble over the strike, and the source of this money would be contributions solicited from other mine workers and other unions. District Officers were to announced [sic] through the jurisdiction that the District could not pay the fine for those getting into trouble, nor could money be received from the International. Obviously, this was

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8. The discrepancy of one day between January 25 and January 26, 1978 was never clarified in the testimony. Because of the vagueness of his testimony, the jury could well have concluded that he was in the Kerry Coal area on January 25, 1978.

made to prevent any implication of participation by the District or the International, or ratification of any such conduct, contrary to its purpose.

How transparent the situation was could be determined from a letter written by Michael Encrapera and later sent to many other unions by the District, which read as follows (P.Ex.27):

"DISTRICT 5 COAL MINERS
THE NEED IS GREAT
GIVE

During our contract strike, the Coal Miners Legal Defense Fund (CMLDF) was formed to help District 5 miners who were harrassed or prosecuted. Dozens of miners were arrested on all kinds of criminal charges. As chairman of CMLDF, I arranged for the miners to have free legal representation and I'm proud to tell you that no District 5 miner was sent to jail. However, in some of the hard core anti-union counties, judges imposed huge fines. Many fines have already been paid, but thousands of dollars are still due. If the fines are not paid, the men will go to jail. *District 5 can't pay the fines because if it does, it will be subject to coal company law suits and federal prosecution.* These men need help and all coal miners should help them—I urge you to help by giving a generous donation to the CMLDF when a collection is taken at your mine. I promise you as a long time coal miner and union member that all money will be used properly and strictly accounted for.

Fraternally
Michael Encrapera,
Chairman
Coal Miners Legal Defense Fund"

(Emphasis added in original.)

The evidence was clear that Encrapera did pay criminal fines and attorney fees in several instances. For example, there was included a bill for services by Kenneth Yablonski, the District's attorney, for services rendered for Ashton, Short and Beachem, and this bill referred to Kerry Coal Company.

District President Antal acknowledged that he was responsible for insuring that signatories to the Union Contract lived up to their obligations, that the membership enjoyed the rights given to them under the Constitution, and directing whatever was needed in the way of services by various District Board Members to benefit the members. Mr. Antal admitted asking International President Miller to send in an International Organizer, Thomas Pysell, to survey the non-union strips because Antal's men were complaining of non-union operations in the District's jurisdiction. Antal claimed that Pysell did not give him any report before Pysell left the area prior to the strike.

Antal acknowledged there was an Executive Board meeting on November 30, 1977, when the strike plans were drawn up and the guidelines for informational pickets and union mine pickets were distributed. He said that informational pickets were to be paid $3.00 a meal and, if they drove, 20¢ per mile, and that the District was to pay these expenses. He estimated that approximately $5,000 was spent for non-union pickets during the strike but could not explain the figure of $37,833 in the District's Report to the National Labor Relations Board as having been spent in January, February and March of 1978. Responsibility for the picket lines in each subdistrict was on the Executive Board Member of the par-

ticular sub-district. Antal disclaimed knowledge of any violence in the area, and particularly denied having seen any newspaper reports of violence in the area, or of having seen the telegram sent by the International on March 8, 1978, addressed to him at District Headquarters, and reading (P.Ex.66):

> "Upon a petition filed by the Regional Director of the National Labor Relations Board, the United States District Court for the Eastern District of Tennessee issued an order enjoining any picketing or any like or related activity, at any non-union mine with whom the International Union does not have a primary labor dispute and any employer under contract with any other union, including trucking companies and railroads. Similar federal court injunctions have been issued in the state of Kentucky and the state of Indiana against several Districts and a number of Local Unions. Therefore, you should advise all the officers and representatives of your District, and all of the Local Unions within your Districts, that they should avoid any such picketing or any other like or any related activity at these types of operations within your District. Full compliance with the policy of the International Union in this regard is of the utmost importance to the integrity and the welfare of our union and its members.
>
> /s/ Arnold Miller
> President"

In addition, President Antal denied authorship or knowledge of a press release issued February 22, 1978 by the District which stated (P.Ex.25):

"On December 6, 1977 when we began our strike, there were very few people who cared about our problem. The industry and the general public thought we were weak and divided. With very few exceptions, we have shown the entire world what coal miners are made of—we won't be broken by any unfeeling and arrogant industry, nor will we be divided from within. There are a few of our members who are bitter because of election defeats both in the District 5 and the International Unions.... Those who would depart from our tradition of complete unity during a national strike are traitors to our cause and we, the District 5 Executive Board, so label them. We call on all of our members to remain strong and we will succeed.

We equally condemn irresponsible Congressmen and other politicians who would interfere in our internal affairs. We promise that they will hear from us in the future.

We will continue our program of legitimate informational and others types of picketing...."

It was clear from the evidence that while Antal did not administer the CMLDF, he was fully aware that the funds were being used to pay criminal fines of strikers. For example, P.Ex.194 was a letter from Antal instructing Encrapera to take care of a criminal fine for a United Mine Workers' member.

The testimony by Ashton and Short corroborated that Jay Kolenc and Estel Taylor were responsible for the men being on the picket lines at the Kerry Coal sites. While they denied any illegal activity, threats or harassment, their credibility was a question for the jury.

According to James Beachem, and apparently believed by the jury, his only involvement was in scouting the strip mines; and, on one occasion, picketing a railroad siding on the Kerry Coal site (the train had already turned around and departed before Beachem appeared). Thus, the jury found in his favor.

Peter Sabo, Secretary-Treasurer of the District, paid pickets out of the District's General Fund. (T.1199) Many of the vouchers submitted for payment included such descriptive phrases as "shut down trucking" (P.Ex.44-39); "Kerry Coal tipple" (P.Ex.44-42); "made check on these strips in afternoon—roving pickets shut them down" (P.Ex.44-45); "left Bentleyville truck stop at 4:30 A.M. covered three gates at J&L stockpile. There are five altogether. Informed all people entering that UMWA are on strike. We informed them that we would appreciate no coal being moved. No coal moving at 8:30 A.M. when we left." (P.Ex.44-46). Sabo admitted that the District spent $38,000 to $40,000 on pickets but denied that he had anything to do with the fines, although two of his checks were apparently cashed in a District Magistrate's office for two of his union members. He paid for both the "no contract—no work" signs and the informational picketing signs.

Steve Segedi, a District Executive Board Member, was responsible for Sub-District 2, which included Allegheny, Washington, and parts of Greene and Westmoreland Counties. A miner by the name of Filla was arrested and charged with violence and Segedi discussed the payment of Filla's fine with Encrapera, and sent Filla to him. He made no investigation of the problem but simply referred Filla to the CMLDF. The closeness of the CMLDF to the District was crystal clear.

Appendix A.

As was previously noted, Estel Taylor was the District Board Member making the decisions with respect to the picketing at the Kerry Coal site. He made the decision to set up the picket line, and to take it down on January 9, 1978, because of the very cold weather and because intermittent picketing at the railroad siding seemed to be shutting off the rail shipments. He acknowledged that Ashton wanted to get people from his Local to set the picket line up again but was never really told why. (T.1053) He said he rode by the Kerry Coal site on January 20th when he was trying to make up his mind whether to institute the picket line again. Brian Short and two other men were with him, and they discussed the situation with Kolenc. He claims he first became aware of the damage to Kerry Coal's equipment on January 22, 1978 when on that afternoon Short called to tell him of Vernon Kerry's accusations. Taylor also called Ashton, who lived nearby, to find out what he knew about it, but was unable to find out anything.

B. *The Union's Defense on Liability*

Samuel Church, formerly Executive Assistant to International President Miller and Vice President of the International after December 22, 1977, was in active charge of the day-to-day operations of the International after President Miller suffered a stroke in July of 1977. He described the extensive negotiations which started in early October 1977 and lasted until March 16, 1978. He denied any personal knowledge of violence in the District's area, saying that he first learned about it when he came to a District rally held in Soldiers and Sailors Memorial Hall in Pittsburgh on January 30, 1978. (T.1906) He said the strike began December 6, 1977 when there was no contract, in accordance with the

United Mine Workers' tradition. While not knowing anything about the violence, he did acknowledge having read the telegram sent to all District Presidents after the Tennessee injunction proceeding. He claimed he first learned about the violence at Kerry Coal when he was informed that an action had been filed and that he would have to give a deposition. He denied any discussion at the International level to try to shut down or disrupt the flow of non-union coal, claiming that if all coal was stopped, it would then have been a national problem which could be remedied under a Taft Hartley injunction. The International did not want that. Church did, however, acknowledge that Jay Kolenc was an International Organizer and that he had been paid by the International for surveying non-union mines in Western Pennsylvania. (T.1936) Church stated that the International's Report showed that in 1977 Kolenc was paid $20,002.36 in salary and $15,952.05 for expenses, for a total of $35,954.51. (T.1943) The 1978 Report showed he was paid a total of $43,255.79, the second highest amount in the group of 40 employees of the International. He admitted that under the Constitution of the United Mine Workers, the International Executive Board would have the power to remove, or to suspend and/or limit the autonomy of a local union that was not carrying out its legitimate objectives, including imposition of trusteeships on the Districts, but said that no investigation was carried out with respect to the District's activities during the strike. Despite letters being sent to the International Headquarters, Church said no action was taken to insure there would be no United Mine Worker violence at the non-union mines. (T.1990)

III. PLEADINGS

The Amended Complaint filed February 13, 1978, after alleging jurisdiction and identifying the parties, set forth in Count I a cause of action under Section 303 of the Labor Management Relations Act, 29 U.S.C. §187, in that the Defendants, acting in concert, committed an unfair labor practice, a violation of Section 8(b)(4), 29 U.S.C. §158(b)(4), by forcing Kerry Coal to cease doing business.

Count II was a claim for exemplary and punitive damages for the Defendants' "wanton and wilful" violations of Section 8(b)(4), 29 U.S.C. §158(b)(4). By order dated June 25, 1979 (with stipulation of counsel), all Individual Defendants were granted summary judgment as to Counts I and II. The Court granted a directed verdict for the International and the District on Count II, at the close of the Plaintiff's case.

Count III alleged a cause under 42 U.S.C. §1985, in that the Defendants illegally interfered with the Plaintiff's rights to be free from unfair labor practices. By opinion and order of August 10, 1978, Defendants Ashton, Beachem and Short were granted judgment on the pleadings on Count III. By order dated June 25, 1979, Defendants Miller, Antal and Taylor were granted summary judgment as to Count III for the reasons given in our opinion of August 10, 1978. The Court granted a directed verdict in favor of the International and the District on Count III at the close of the Plaintiff's case.

Count IV was a pendent state law claim for violent and tortious interference with existing contracts and existing and prospective business relationships between Kerry Coal and others with whom it did or would do

business. The Court granted a directed verdict in favor of Defendant Miller on Count IV at the close of the Plaintiff's case, and granted a directed verdict in favor of Defendant Antal at the close of the case.

Count V alleged that Defendants interfered with the Plaintiff and Plaintiff's employees, and thereby interfered with the rights of such employees to work at their lawful vocation. The Court granted a directed verdict in favor of all Defendants on Count V at the close of the Plaintiff's case.

Count VI was a claim for exemplary and punitive damages for Defendant's wanton and wilfull [sic] interference with Plaintiff's contractual relationships. The Court granted a directed verdict in favor of Defendant Miller on Count VI at the close of the Plaintiff's case. The Court, in effect, granted a directed verdict in favor of Defendant Antal on Count VI when it directed a verdict in his favor on Count IV.

IV. Applicable Law

A. *Judgment Notwithstanding the Verdict*

A judgment notwithstanding the verdict under Federal Rule of Civil Procedure 50(b) is properly granted if, without weighing the credibility of the evidence, there can be only one reasonable conclusion as to the proper judgment, and it is contrary to the verdict. *See Thomas v. E. J. Korvette, Inc.*, 476 F.2d 471, 474 (3rd Cir. 1973); *Carpenter v. Koehring Co.*, 391 F.Supp. 206, 208 (E.D.Pa. 1975), *aff'd* 527 F.2d 644 (3rd Cir. 1976). The court, as a matter of law, must determine whether the evidence was sufficient to create an issue of fact for the jury, and in

doing so, the court may not weigh the evidence, pass on the credibility of witnesses, or substitute its own judgment of facts for that of the jury. Wright & Miller, *Federal Practice & Procedure: Civil* §2524 at 541-544. The evidence must be viewed in the light most favorable to the party securing the verdict, and all inferences must be drawn in that party's favor. *Monsen v. Consolidated Dressed Beef Co., Inc.*, 579 F.2d 793, 796 (3rd Cir. 1978); *Thomas v. E. J. Korvette, Inc., supra.* The jury verdict may be overturned only where the facts and all inferences would not permit a reasonable man to come to the conclusion reached by the jury. *Marder v. Conved Corp.*, 75 F.R.D. 48, 54 (E.D.Pa. 1977).

B. New Trial

The court has considerable discretion under Federal Rule of Civil Procedure 59 to order a new trial to prevent a perceived miscarriage of justice, and there are many possible grounds for such a decision. *See generally* 6A *Moore's Federal Practice* ¶59.08 (2d ed. 1979). A motion for new trial imposes the duty on the court to insure that the verdict was not influenced by partiality or prejudice, and that there is no miscarriage of justice. *University Marketing & Consulting, Inc. v. The Hartford Life & Accident Co.*, 413 F.Supp. 1250, 1262 (E.D.Pa. 1976); *Southeastern Pennsylvania Transportation Authority v. Transit Casualty Co.*, 412 F.Supp. 839, 842 (E.D.Pa. 1976). However, the court must not interfere with the verdict unless it is quite clear that the result reached by the jury was seriously erroneous. The credibility of witnesses is a matter for the jury, and a new trial may not be granted merely because the evidence is sharply in conflict, *Barrett v. Robinson*, 65 F.R.D. 652 (E.D.Pa. 1975), or because the jury could have drawn

different inferences or conclusions. *Gregory v. South Hills Movers, Inc.*, 477 F.Supp. 484, 487 (W.D.Pa. 1979). In a case such as the one presently before us, it is the function of the jury to determine the credibility of the witnesses, that is, what testimony is to be believed. *See Lind v. Schenley Industries, Inc.*, 278 F.2d 79 (3rd Cir.), *cert. denied* 364 U.S. 835, 81 S.Ct. 58, 5 L.Ed.2d 60 (1960).

In deciding a motion for a new trial, the court must insure that there is no miscarriage of justice, but at the same time, it must respect a plausible jury verdict. This necessarily involves a commonsense determination, such as that articulated by Wright and Miller: "If, having given full respect to the jury's finding, the judge on the entire evidence is left with the definite and firm conviction that a mistake has been committed, it is to be expected that he will grant a new trial." Wright & Miller, *Federal Practice & Procedure: Civil* §2806 at 49.

Furthermore, a new trial should not be granted on the basis of asserted errors which, in the circumstances, were not prejudicial. *See* F.R.Civ.P. 61. Given these well-known general principles, we turn to the contentions of the Defendants.

V. The Motions

A. *The Procedural Problem*

In its Motion for Directed Verdict, made at the close of the evidence, the International asserted two grounds under Count I:

> (1) There was no evidence the International coerced or restrained any person, or induced or encouraged any individual employed by any person to engage in a strike or cease doing business.

(2) There was no evidence the International ever engaged in such activity with an object thereof to force any person to cease doing business with any other person. (T.2287)

The Motion for Directed Verdict as to Count IV was based on the grounds that:

(1) There was no evidence pertaining to any violent acts.

(2) There was no proof of authorization by the International. (T.2290-91)

Although the International asserted fourteen grounds in its Motion for Judgment Notwithstanding the Verdict filed after the trial, such a Motion may be based only upon the grounds included in its original Motion for Directed Verdict. *See C. Albert Sauter Co. v. Richard S. Sauter Co.,* 368 F.Supp. 501 (E.D.Pa. 1973); *Lewis v. Mears,* 189 F.Supp. 503, 509 (W.D.Pa. 1960), *aff'd* 297 F.2d 101 (3rd Cir. 1961), *cert. denied* 369 U.S. 873, 82 S.Ct. 1142, 8 L.Ed.2d 276 (1962); 5A *Moore's Federal Practice* ¶50.08 at 50-86 (2d ed. 1979). *See also Lowenstein v. Pepsi Cola Bottling Co.,* 536 F.2d 9 (3rd Cir.), *cert. denied* 429 U.S. 966, 97 S.Ct. 396, 50 L.Ed.2d 334 (1976); *Dudding v. Thorpe,* 47 F.R.D. 565 (W.D.Pa. 1969).

Further, on January 14, 1980, more than three months after the verdict and the entry of judgment, Defendants International and District filed a Supplemental Motion for New Trial asserting four additional grounds. This procedure was unavailing to the Movants for this Court may not consider grounds belatedly asserted. *Arkwright Mutual Insurance Co. v. Philadelphia Electric Co.,* 427 F.2d 1273 (3rd Cir. 1970); *Massaro*

v. United States Lines Co., 307 F.2d 299, 303 (3rd Cir. 1962); *Russell v. Monongahela Railroad Co.*, 262 F.2d 349, 354 (3rd Cir. 1958). The district court is without authority to grant a new trial for reasons assigned after the mandatory ten day period under F.R.Civ.P. 59(b). However, none of the reasons assigned have merit, as we will later discuss.

B. *The International's Motions*

The International first argues that the only evidence against it related to the activities of International Organizer Jay Kolenc, and that these activities were insufficient on which to base liability. It points to the express instructions to Kolenc to "remain on (his) present assignment", which did not include establishing or participating in a picket line. It contends that if Kolenc was merely an employee of the International, the evidence would be insufficient to support the verdict since Kolenc would have been acting outside the scope of his authority.

Kerry Coal, however, contends there was sufficient evidence upon which the jury could base a finding of liability. They point to the fact that Kolenc was employed by the International and was sent into the Western Pennsylvania area to assist or to take over for Thomas Pysell. (P.Ex.49) He was in constant contact with District Executive Board Member Estel Taylor, and was the person making the decision to establish the picket line at the Kerry Coal site. Kolenc came to Ashton's home, advised Ashton on establishing a picket line at Kerry Coal (T.1851), and directed Taylor to call Ashton to finalize plans for picketing. The plans for establishing the picket line at the rail siding where Kerry

Coal's equipment was later destroyed were finalized at the meeting at Felix's Bar which Kolenc attended. Kolenc was at the picket line on several occasions when Plaintiff's employees were threatened and violence occurred. More importantly, on January 20, 1978, two days before Kerry Coal's heavy mining equipment was destroyed, Taylor, Short and other union members again surveyed the Kerry Coal sites and, immediately thereafter, they met with Kolenc. During the evening of the next day, the damage was done to the equipment at the Kerry Coal site. Kolenc left the area a few hours before Kerry Coal's mining equipment was destroyed. (T. 1994) Kerry Coal contends Kolenc's connection with the incident is a matter for the jury to determine.

In our view, Kolenc's activities could be the basis for the International's responsibility when and if they were committed within the scope of his general authority, whether or not they were specifically authorized or ratified. This is consistent with Section 301(b) and (e) of the Labor Management Relations Act, 29 U.S.C. §185(b) and (e), which provides in pertinent part:

> "(b) Any labor organization . . . shall be bound by the acts of its agents.
>
> * * *
>
> (e) For the purpose of this section in determining whether any person is acting as an 'agent' of another person so as to make such person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."[9]

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9. We note the Supreme Court's discussion in *Carbon Fuel Co. v. United Mine Workers of America,*

Thus, in *White Oak Coal Co. v. UMW,* 318 F.2d 591, 598 (6th Cir. 1963), *cert. denied* 375 U.S. 966, 84 S.Ct. 484, 11 L.Ed.2d 415 (1964), it is stated:

> "The Union was responsible for the acts of their representatives only if the latter were engaged within the scope of their employment or authority; but actual authorization of specific acts was unnecessary."

See Vulcan Materials Co. v. United Steelworkers, 430 F.2d 446, 457 (5th Cir. 1970), *cert. denied* 401 U.S. 963 (1971); *UMW v. Osborne Mining Co.* 279 F.2d 716 (6th Cir.), *cert. denied* 364 U.S. 881, 81 S.Ct. 169, 5 L.Ed.2d 103 (1960).

Kolenc could be found to have exhibited a pattern of conduct in direct cooperation with Estel Taylor, District Executive Board Member, and, if they were acting in concert, they are responsible for each other's conduct and the conduct of each other's agents. *See Vulcan Materials Co. v. United Steelworkers, supra.* Whether Kolenc was acting within the scope of his employment was a question for the jury to determine, and the Court so instructed the jury.[10] *See Chuy v. Philadelphia*

—— U.S. ——, 62 L.Ed.2d 394, 399 n.6 (1979), where the court noted: "Congress applied to unions the common-law doctrine of *respondeat superior* rather than the more restrictive test of union responsibility under §6 of the Norris-LaGuardia Act, which requires 'clear proof of *actual* participation in, or *actual* authorization of such acts, or of ratification of such acts after *actual* knowledge thereof.' 29 U.S.C. §106 (emphasis supplied)."

10. Although the duties of Kolenc were never explicitly explained, we believe the jury could reasonably have found that part of his duties included the organizing of pickets and other activity against non-union mines during the strike.

Eagles Football Club, 595 F.2d 1265, 1276 (3rd Cir. 1979) (en banc). No exception was taken to the Court's charge on this matter.

Our case is very different from ***Carbon Fuel Co. v. United Mine Workers of America,*** —— U.S. ——, 62 L.Ed.2d 394 (1979), where local labor unions engaged in an [sic] number of unauthorized or "wildcat" strikes at petitioner-employer's coal mines in violation of a collective bargaining agreement between petitioner and the respondent international union. The court held that the international and district had no obligation under the maintenance of the integrity of the contract clause to use reasonable means to prevent and end unauthorized strikes because, the Court said, Congress had limited the union's responsibility to cases where the union may be found liable according to the common law rule of agency. In the instant case, there was evidence of Kolenc's extensive and active participation in, and leadership of, the illegal activity. Therefore, ***Carbon Fuel*** does not support the Defendants' Motion for Judgment Notwithstanding the Verdict in this case.

Buckeye Power, Inc. v. Utility Workers Union of America, 607 F.2d 759 (6th Cir. 1979), is also inapplicable. There, a representative of the national union was present at the scene of the strike on the first day of the walkout, and the only evidence of his involvement was that he warned the local union that picketing of the gates was prohibited. This was found to be insufficient evidence of actual involvement and control. The limited involvement by the national's agent in ***Buckeye*** is in sharp contrast to the role played by Kolenc in the instant case.

We believe there was sufficient evidence for the jury to have concluded that the International, through the actions of its Organizer Jay Kolenc, induced or encouraged the employees of Kerry Coal, or of the railroad, or the trucking companies to refuse to process, transport or handle Kerry coal with an object thereof to force Kerry Coal to cease doing business, or to force the trucking companies or the railroad to cease processing, handling, or transporting Kerry coal.

Count IV, the pendent state claim, was based on tortious interference with a contractual relationship, and thus, under Section 6 of the Norris-LaGuardia Act, 29 U.S.C. §106, clear proof of actual participation or actual authorization of violent acts was required, and the jury was so instructed. The International argued in its Motion for Directed Verdict at the close of evidence that there was no proof of violence and no proof of International authorization. However, the testimony did indicate that threats, obscene gestures, and intimidation occurred on the picket line (T.345), and on January 20, 1978, one day before the Kerry Coal equipment was destroyed, Kolenc met with Estel Taylor and other union members. This was a sufficient basis from which the jury could draw the inference that Kolenc was actively involved in both violent activities on the picket line, as well as in the actual planning of the destruction of the Kerry Coal equipment. Kolenc did not deny his activity.

C. *District's Motion for Judgment Notwithstanding the Verdict*

At the close of the evidence, the District moved for a directed verdict. Under Count I they claimed there

was no evidence the District coerced or restrained any person, or induced or encouraged any individual employed by any person to engage in a strike or cease doing business, or engaged in such an activity with an object to force any person to cease doing business with any other person. As to Count IV, the District claimed that there was no evidence of violence on its part. The overwhelming evidence however indicated that the District, with the know-how provided by the International Organizers, planned and implemented the campaign to interfere with the production and sale of non-union coal during the strike, including Kerry coal, and that Kerry Coal's damages resulted therefrom.

It was District President Antal who wrote the letter to all non-union operators charging that they failed to meet wage and benefits standards. It was also Antal who directed the distribution of picketing instructions to District members, which stated that they were to picket "only where an authorized representative of the United Mine Workers of America has directed you to perform your picket duties . . . You are there to publicize the fact that this coal mine operation is destroying area standards by paying substandard wages and benefits." The District authorized payments for picket duty at non-union operations and paid the pickets some $40,000. Defendant Executive Board Member Estel Taylor was assigned responsibility for strike activity in the area of Kerry Coal's mining sites; he discussed with Kolenc and Ashton, Kerry Coal's operation and their intent to stop the movement of coal by Kerry. The District furnished pickets with picket signs, and District Officers directed the attack on Kerry Coal's operation. Taylor ordered the picket line to be manned on a 24-hour basis and was present on the picket line when a coal train was stopped.

Taylor signed and approved vouchers for "scouting". Nails were thrown across the entrances to Kerry Coal sites; Kerry Coal's employees, truck drivers, and customers were harassed; United Mine Worker members, paid by the District, mobbed Kerry Coal's tipple and ordered Vernon Kerry to cease hauling coal which brought about the closing of the Kerry Coal operations. Kerry Coal's equipment was destroyed in the early morning hours, just as Ashton and Beachem had threatened. Short's car tracks were seen in the snow on the morning of the day the damage was done; Short did not deny having been involved but only states that he did not think he had been seen. Violence and threats by United Mine Worker members prevented Kerry Coal from shipping to its customer, St. Joe Mineral; again, the pickets there were paid by the District, and these pickets destroyed Kerry Coal's trucks. The evidence indeed was strong against the District as to its responsibility for the picketing and violence in the area.

D. *Estel Taylor's Motion*

Estel Taylor moved for a directed verdict at the close of the evidence contending that under Count IV there was insufficient evidence to show clear proof of participation in violent acts directed at Kerry Coal which were a substantial factor in causing the damage claimed. We have previously discussed Taylor's participation in connection with the District's Motion. The jury could have found sufficient evidence of Taylor's involvement in violence through his actions in planning and establishing the picket line, by his signing and approving vouchers for scouting activities, and by his contact with Kolenc and Short prior to the destruction of the Kerry Coal equipment.

E. *Ashton and Short's Motion*

In their Motion for Directed Verdict, Defendants Ashton and Short contended there was no proof established as to their participation in violent acts. As to Ashton, the evidence showed he lived near the Kerry Coal's Franklin Township site, and that he urged Kerry's employees to cease working. Later, concerned with Kerry's continuing operations, Ashton and his friend Beachem sought to prevent Kerry's operations and stopped a truck hauling Kerry coal, telling the driver he should advise his employer that, as a sensible man, he should immediately cease hauling. (T.1536-37) Whether this constituted a threat was a matter for the jury to determine.

On the same day, Ashton and Beachem confronted Vernon Kerry and threatened if he did not shut down, they would make a phone call and bring in 200 men "to wreck [his] equipment". (T.562) Ashton contacted Kolenc, the International Organizer, and, within a month, the Kerry Coal equipment was destroyed. Late in December 1977, Ashton himself began to picket the Kerry Coal rail siding, and the picket line which Kolenc, Taylor and Ashton had established was characterized by violence and intimidation. Ashton remained in close contact with Taylor, and Taylor phoned Ashton on January 20, 1978, after the surveillance of Kerry Coal's Franklin Township site and the meeting with Kolenc. At 7:18 P.M. on January 21st, Taylor again phoned Ashton and later that evening the mining equipment located just below Ashton's house was substantially destroyed. Ashton maintained that he was asleep until 11 A.M. on Sunday, but the telephone records showed that Taylor spoke with Ashton about 9:26 A.M., after

the damage had been done. With this evidence, the jury could well have determined that Ashton employed violence and intimidation to tortiously interfere with Kerry Coal's contractual and business relationships, and his credibility was sorely tested.

As to Short, the evidence indicated he met with Taylor, Ashton and Kolenc to plan the picketing. He followed coal trucks and conducted surveillance at the Kerry Coal operation. He confronted Vernon Kerry with the threat of physical violence if Kerry continued to operate, and he was with Taylor during the surveillance of the Franklin Township site on the morning of January 20th and was present at the meeting with International Organizer Kolenc several hours later.

It was finding the tracks of Short's Ram Charger encased in the fresh snow that led Vernon Kerry to accuse Short of having been seen at the site of the damaged Kerry equipment, to which Short replied only "I don't think so." There was no denial of being involved and, instead, after Kerry confirmed that the tracks he saw belonged to Short's vehicle, Short later removed and retreaded the tires. Again, a jury could reasonably have found from this evidence that Short had been involved in tortious and violent interference with Kerry Coal's business relationships.

VI. The Damage Award

A. *Plaintiff's Method of Calculation*

Kerry's expert accounting witness, James R. Kilzer, a certified public accountant, of the independent accounting firm of Price Waterhouse ("P.W."), holds a Masters Degree in Business Administration from the University of Pittsburgh and had four years prior ex-

perience as a Cost Analyst for the United States Steel Corporation. Kilzer testified he reviewed Kerry Coal's books and records and determined four types of damage suffered, *i.e.,* (1) lost profits from business interruptions, (2) excess labor costs incurred, (3) lost interest income on profits, and (4) out-of-pocket expenses from the picketing.

As to lost profits—surface mining, a base period of February 1978 (except the 1st and 27th) was considered representative. Kilzer determined from production and sales records the tonnage Kerry Coal could have produced and sold over the strike period (T.1694); the two days (February 1 and 27) were excluded because of the low level of activity on those days. He calculated the profit per ton by determining the "customer mix" (T.1696), *i.e.,* a breakdown of the sales for each customer as the prices per ton varied (T.1698), to which was applied the cost of production as accumulated from the most recent cost records (to September 30, 1977). The final calculation then was the total estimated sales tonnage for the period of the strike, less the amount of tons sold; the customer mix was applied and the lost profit calculated, customer by customer; the lost profits per customer were added to total the lost profits-surface mining.

As to lost profits—auger mining (mining by auger from face of coal done by contractors), since there was no augering in February 1978, a base period of the year before was used (to October 31, 1977). The calculation again was made of lost auger sales tonnage during the strike period against which was applied a cost figure to arrive at lost profit-auger. The month of December 1977 was not included for augering was not scheduled then.

Appendix A.

Lost man hours was equated to excess labor cost incurred by Kerry Coal during the strike period, *i.e.*, labor not utilized for productive purposes. Kilzer compared the normal labor cost per ton with the labor cost per ton during the strike. The excess labor cost per ton was multiplied by the number of tons produced during the strike.

Lost interest income was calculated from the amount of money Kerry Coal would have earned on the profits prevented by the strike. Kilzer used the experienced interest rate applied to profits as if received evenly over the period.

Out-of-pocket expenses included expenses for equipment repairs, calculated by adding the invoices for certain replacement equipment and repairs, and the costs of security guards and attorney fees for obtaining a state court injunction.

The damages then developed were as follows:

Lost Profits—Surface Mining	$ 661,167
Lost Profits—Auger	186,305
Lost Man Hours	152,631
Lost Interest Income (to 5/1/79) ($28,000 more to 10/1/79)	90,963
Equipment Repairs	6,739
Other Expenses	3,173
Total	$1,100,978

The basis of the testimony was that all the coal Kerry Coal could produce would have been sold, and the calculation was made "using the best means available to make the calculations." (T.1755)

B. *Defendants' Damage Testimony*

Defendants called Farrell Rubenstein as their expert witness. Mr. Rubenstein had been an accounting partner of Bachrach, Sanderbeck & Company from 1962 to 1970, at which time the company merged into Touche Ross & Company. Mr. Rubenstein became a member of its National Board of Directors. He reviewed the report and the documentation of Kerry Coal.

Mr. Rubenstein opined that P.W. had insufficient documents on which to base a valid opinion (T.2056); he felt he needed financial statements which would provide production costs during the months following the fiscal year ending September 30, 1977. (T.2128); and he wanted sales history by customer for three years; he faulted the assumption that February 1978 was a proper base month and claimed it was improper to apply costs for a different period (Kilzer said he used a different period because they were the most recent cost figures available). Rubenstein disagreed with the assumption that augering would have been done in January, February and March, and contended P.W. used the wrong comparative figures.

He concluded that P.W.'s calculations were mathematically correct (T.2143), but that the back-up for the figures were not available since P.W. did not have them either. He concluded the use of February as the base month was solely to enhance the damages. (T.2145)

As to lost man hours, Rubenstein objected to the calculations used of average cost per ton based on the year before instead of the cost in February 1978, which was an unimpaired month. And, as to the non-productive man hours, he objected on the basis that back-filling,

one of the non-productive operations performed by Kerry Coal's employees during the strike, is a non-productive cost which was not properly credited. (T.2161). In addition, he claimed that the period immediately prior to the strike was a high activity period when customers were building inventories, and that February was the next period of stockpiling. Thus, Kerry Coal could not have maintained its February sales through the period. Finally, he concluded that no ultimate conclusion could be made as to damages from P.W.'s Report. (T.2180)

C. *The Court's Review*

The jury could well have found that Kerry Coal was forced to close its mining operations in December 1977 because of United Mine Worker violence in the area. Kerry Coal's employees were later intimidated, trains stopped, truckers harassed, land owners "talked to", and, finally, Kerry Coal's mining equipment so badly damaged that production was seriously affected. Once the Plaintiff established that its business and property were damaged, it is not necessary to prove the exact amount of the damage suffered. It is sufficient if the evidence supports a just and reasonable approximation. Thus, in *Sheet Metal Workers International Association, Local 223 v. Atlas Sheet Metal Co.*, 384 F.2d 101, 109 (5th Cir. 1967), it is stated:

> "Section 303 of the NLRA, 29 U.S.C. §187, permits any person injured in his business or property as a result of a Section 8(b)(4) violation to bring suit to recover the damages he has sustained plus the costs of suit. The statute is compensatory in nature . . ., and damages may only be recovered for actual losses sustained as the result of the unlawful

secondary activity. While the employer must prove that he has sustained some injury to his business or property, he need not detail the exact amount of damages suffered. It is sufficient if the evidence supports a just and reasonable approximation. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 51 S.Ct. 248, 75 L.Ed. 544 (1931)."

Kerry Coal succeeded in proving that it was, in fact, damaged as a result of the Defendant's conduct. The testimony of its accountant from P.W. supported its theory of lost profit damage. Given the testimony concerning high demand for coal throughout the strike period and Kerry Coal's use of its actual sales data in computing lost profits, the P.W. damage testimony was entirely proper.

Plaintiff's P.W. expert testified to the selection of February 1978 as the base period, giving a very detailed explanation of his reasons for so doing. He calculated the losses as $1,100,978, and said his figure was conservative, not including $28,000 interest to date of trial. We cannot see in this calculation where there is any seriously erroneous result reached by the jury. Defendants contend that the Kerry Coal damage is dependent upon an express finding of business interruption during every day of the strike. But Kerry Coal's theory of damages was based on a course of conduct which was to cause a decrease in the level of monetary return. Whether the damages were attributable to customer decisions to cancel or curtail orders in the face of widespread United Mine Worker violence and intimidation would not lessen Kerry Coal's right of recovery. Kerry Coal's theory of damages assumed only that it would have sold as much coal during the strike period as it did during the Febru-

ary base period, if the Defendants had not interfered with its operations. The validity of the base period was a matter for the jury.

VII. The Special Arguments

A. *The Discovery Claims*

This Court has carefully reviewed Defendants' contention that the Court prevented them from inquiring into the substance of Kerry Coal's damage claims during discovery. We find this argument to be without merit.

Plaintiff, on March 5, 1978, filed a comprehensive statement of monetary damage, including a six-page letter from its damage expert relating to the methodology used in calculating damages and a 13-page document detailing the calculation. Defendants were thus apprised of the nature of the monetary damage claimed by Kerry Coal substantially prior to trial. Further, Plaintiff made available to Defendants' counsel on April 5, 1978 all the business records intended to be marked as exhibits. On May 10, 1978, this Court heard argument on Defendants' Motion to Exclude certain of these business records at trial which Kerry Coal had not produced. Over the Plaintiff's objections, this Court ordered Kerry Coal to produce all documents reviewed by its expert witness. These were thereupon produced. Thus, the Court went the full distance required by the law to compel, prior to trial, the complete disclosure of the methodology and calculations of Kerry Coal which the Defendants could be expected to meet at trial.

B. *The Evidentiary Rulings*

The Defendants contend that the Court erred in permitting District Executive Board Member Steve

Segedi to testify that the District was instrumental in securing payment for arrested District members.

The evidence showed that Segedi was aware of the arrest of his friend, Gerald Filla, for dumping trucks loaded with non-union coal. Filla advised Segedi that he had been fined and Segedi sent him to Michael Encrapera, the Administrator of the CMLDF, and instructed Encrapera to make a check payable to Anna Shriner to cover Filla's fine. Segedi admitted approving vouchers to reimburse Filla for following coal trucks going to a zinc works in Burlington; this is where Filla was arrested. The proof was relevant to the relation between the District and the CMLDF, which was used to pay Filla's fine at Segedi's direction. It was also admissible as ratification of specific acts of strike violence.

The Defendants contend that the Court erred in admitting Plaintiff's Exhibits 70 and 71. Plaintiff's Exhibit 71 is a letter, dated January 31, 1978, from the General Counsel of the National Labor Relations Board, John Irving, to Harrison Combs, General Counsel of the International, alleging involvement of the International Executive Board members, agents and employees in illegal activity at non-union mines. Sam Church, the Vice President of the International, and the man in charge of the day-to-day operations of the union, denied ever seeing this letter, but the authenticity of the letter had been admitted and the only objection related to relevancy. Clearly, the letter was relevant. Plaintiff's Exhibit 70 was also a letter, dated February 2, 1978, from Willard Owens, Associate General Counsel of the International to John Irving. Both of these letters related to the activities of the International and the International's knowledge with respect to activities being conducted against

non-union mines during the strike. Sam Church, as noted, on behalf of the International, denied any such knowledge, as had District President Antal before him. At this point, the Court ruled they were relevant to the determination of that issue. Since both bore direct relationship to knowledge by the chief administrative officers of each, these exhibits were used to impeach the credibility of these assertions. Accordingly, the Court did not err in admitting into evidence Plaintiff's Exhibits 70 and 71.

C. *The Veon Coal Company Incident*

Defendants allege error in permitting cross examination of Estel Taylor as to his knowledge of violence at Veon Coal Company, a competitor of Kerry Coal. The questioning was permitted after Vernon Kerry had testified that he had heard about violence at a competitor's operation, to show his frame of mind concerning the necessity of closing his own operations. (T.337) The examination of Estel Taylor was not assuming the facts of any violence, but was simply to show that he had heard of this violence as well, so that it was not just a figment of Vernon Kerry's imagination. The Defendants cannot possibly assert that admission of this evidence was "to instill in the jury's mind the fact that the equipment at Veon was destroyed." The evidence was relevant to the testimony of Vernon Kerry, and the necessity of the December work stoppage.

D. *The International's LM-2 Report*

The International argues that it was error to admit into evidence the International's Labor Management Year End Report which showed a contingency litigation fund of $8,000,000. In the first place, the Report was admitted into evidence without objection (T.1938) and

cross examination of Sam Church with respect thereto was done without objection. Furthermore, this fund was established early in 1977, before the strike began and was relevant to the relationship of the International to the expected activities of its members.

E. *The Testimony that Plaintiff's Employees were Afraid*

Defendants have alleged that the Court erred in overruling their objection to Vernon Kerry's testimony that his employees were afraid; counsel objected to testimony as to the emotional or mental state of people that were not at trial to testify. The contention is that there was no exception to the hearsay rule which would permit such testimony. However, Vernon Kerry was testifying concerning his own observations of the physical and mental condition of his employees, based upon his first-hand knowledge of how they were acting. This is clearly not hearsay. *Sunderland v. Pittsburgh & Lake Erie Railroad,* 344 F.2d 960, 961 (3rd Cir. 1965) (per curiam); *see also Cole v. United States,* 327 F.2d 360, 361 (9th Cir. 1964). Thus, Vernon Kerry's testimony was admissible.

F. *The Court's Participation in Interrogation of Certain Witnesses*

Under Fed.R.Evid. 614(b), "the Court may interrogate witnesses, whether called by itself or by a party."

The Court assiduously throughout this lengthy trial, covering 16 days and with a transcript of 2636 pages, interjected questions where it considered that matters were not clear to the jury. An examination of the record, we believe, will indicate no such questioning as is claimed by the Defendants. The objection was made in regard to questions asked of Brian Short after he had testified he

had not been subject to anyone's direction in setting up the picket line, particularly from the District or the International. Earlier, the Court had understood Short to say, and understood Estel Taylor to say, that there was no question that the District, through Taylor, had ordered the picket line to be set up, and that it had been done directly at District President Antal's request and at Taylor's direction, and that they had ordered Short to do it. While Short was on the stand and subject to cross examination of counsel for the International, and in the context as above set forth, the Court asked the following questions (T.1333-34):

"Court: Let me just ask, didn't you say that the picket line was set up, the formal picket line, on directions of Mr. Taylor. Wasn't it Mr. Taylor that determined that the picket line should go up?

Witness: Yes sir.

Court: Well, who is Mr. Taylor associated with? What was his position?

Witness: Are you asking me, your Honor?

Court: Surely. You are the one that is on the witness stand.

Witness: OK. He is the District Board Member, sir.

Court: Where?

Witness: At District 5.

Court: Alright.[sic]"

The following discussion then took place between the Court and Counsel for the International (T.1334-35):

"Counsel: I don't understand, your Honor. I never asked him whether anybody from District 5 ever told him to picket or not. I asked him about an International representative or anybody from the International telling him to picket.

Court: And you also said District 5.

Counsel: Oh no, not with regard to picketing. I asked him with regard to—

Court: Well, the jury will recall the testimony. It will be for the jury to remember what the testimony was."

These questions were certainly proper in every respect. They were necessary to bring out matters which were important and which had not been sufficiently touched on by counsel. *See United States v. Stirone,* 311 F.2d 277, 279 (3rd Cir. 1962), *cert. denied* 372 U.S. 935, 83 S.Ct. 881, 9 L.Ed.2d 66 (1963); *United States v. Ostendorff,* 371 F.2d 729, 732 (4th Cir.), *cert. denied* 386 U.S. 982, 87 S.Ct. 1286, 18 L.Ed.2d 229 (1967). In addition, this was apparently an afterthought since it was not brought to the Court's attention until the next day, which, by the express terms of Fed.R.Evid. 614(c), was untimely.

G. *Plaintiff's Counsel's Closing Arguments*

Plaintiff's counsel had stated "The Veon Coal Company, right next to the Kerry Coal Company, was hit with violence on December 12. We closed down December 13. Short was at Veon. Taylor was at Veon. We have to—then they destroyed Veon's equipment and he tells you there's no causal relation between us closing on the 13th and what went on at Veon." (T.2560) It is true, as

Kerry's counsel argues, that he did not say that either Short or Taylor were at Veon when the equipment was destroyed. Counsel merely stated they had been at Veon, and this is borne out by the record. Taylor admitted he was present at Veon during the strike (T.798, 1293, 1366) and admitted he was aware of violence at Veon. The contention that the Plaintiff's closing gave a wrong impression is of no merit.

H. *Defendants' Objections to the Special Interrogatories*

The International and the District argue that the Court erred in submitting special interrogatories 1, 2, 4, 5, 7, 8, 10 and 11 to the jury, in failing to require the jury to identify with whom it was the Defendants' object to force the Plaintiff to cease doing business. Objection on these grounds was only obscurely raised during the discussion on the points for charge and it need not be considered now. *See C. Albert Sauter Co. v. Richard S. Sauter Co., supra.* Thus, in *Chuy v. Philadelphia Eagles Football Club, supra,* the defendant, in a motion for new trial, argued that the special interrogatories were misleading and contained improper and inadequate instructions. The court held that this issue was not before it because specific objections to the interrogatories were not properly made prior to their submission to the jury.

In any event, the objections to the instant interrogatories are wholly without merit. Interrogatory 1, set forth previously, focused on whether or not the International induced or encouraged the employees of Kerry Coal, or of the trucking companies, or of the railroad to refuse to process, transport or handle Kerry coal. In Interrogatory 2, the jury was asked to determine

whether the object of that conduct was to force Kerry Coal to cease doing business, or the trucking companies, or the railroad to cease transporting or handling Kerry coal. Interrogatories 4 and 5 asked similar questions as to the District.

The Defendants' objection assumes that the jury could have found that the Defendants forced Kerry Coal to cease doing business without finding that it could have been forced to cease doing business with any other person. Particularly in light of the Court's instructions (T.2587-89), confusion could not possibly have resulted and the Defendants' objections are groundless.

In this regard, we consider Ashton and Short's contention that the answers of the jury to the special interrogatories were so inconsistent as to require the granting of a new trial. This issue was raised for the first time in the Defendants' Amended Motion for Judgment Notwithstanding the Verdict or for New Trial and need not be considered. *See Arkwright Mutual Insurance Co. v. Philadelphia Electric Co., supra.* The Defendants argue that the jury's answer to Special Interrogatory 16A is inconsistent with the other answers. The Court had instructed the jury (T.2610-11) that the damages awarded in Interrogatory 13 under Count I should not be added with the damages awarded under Count IV, in order to come up with the answer to Interrogatory 16, saying: "What you must find is the compensatory damage due under each one." The Defendants assume that the 1.2 million dollars are for damages which could not be awarded under Count I. However, the jury's answers to the Special Interrogatories do not support that assumption. The Special Interrogatories did not request the jury to specify the type of damages, nor did Defendants Ash-

ton and Short request such a breakdown. Their assumption that the jury, by awarding the same amount under Count I and Count IV, awarded damages for non-violent activity under Count IV is wholly at odds with the jury's answers to Special Interrogatory 15. The Defendants admit that the jury's answers are susceptible to different interpretations. There is a perfectly consistent interpretation that may be given to the answers as hereinabove set forth.

I. *Defendants Ashton and Short's Objection to Plaintiff's Exhibit 197A*

Defendants Ashton and Short have objected to the admission of Plaintiff's Exhibit 197A (referred to by their counsel as P-196), a bill submitted by their counsel to the District's CMLDF. Relevance is questioned as Michael Encrapera, the Fund's Administrator, had testified that the CMLDF did not consist of the District's money; furthermore, even if the District was the source of the funds, the evidence would not be relevant. These Defendants also object to the admission of the bill as being highly prejudicial, confusing or misleading. *See* Fed.R.Evid. 403.

District President Antal testified that he had requested his longtime friend and United Mine Worker Member, Michael Encrapera, to establish the CMLDF in anticipation of the strike. Much of the money sent directly to the District's Strike Fund and to the International was diverted to the CMLDF. Antal and other District Board Members on occasion asked Encrapera to "take care of" various problems which were encountered. It was thus for the jury to decide if the CMLDF was a separate fund, or if it was a method used by the District

to take care of the criminal fines of its members who got into trouble. The payment of Ashton and Short's legal fees by the District aided the jury's understanding of the relationship of the District to the violence, particularly in light of the fact that the CMLDF was set up before the strike even began.

At trial, counsel never objected to the bill on the grounds set forth in Fed.R.Evid. 403, but asserted that the bill was not relevant to the facts in issue and was subject to an attorney-client privilege. (T.128, 130) The Defendants chose not to press objection to a bill paid by a third party on the grounds of attorney-client privilege, nor could they. There was thus no error in admitting the bill.

J. *The Apportionment of Damages*

Defendants Ashton and Short contend that the Court erred in refusing to apportion damages among the Defendants. This issue as such was first raised in Defendants' Amended Motion and would not need to be considered by the Court. *Arkwright Mutual Insurance Co. v. Philadelphia Electric Co., supra.*

Prior to the charge of the Court, the parties were advised of the charge and Ashton and Short vaguely objected because of the potential for joint and several liability; however they did not propose any points for charge with respect to the apportionment of damages. *See Frankel v. Burke's Excavating, Inc.,* 269 F.Supp. 1007 (E.D.Pa. 1967), *aff'd* 397 F.2d 167 (3rd Cir. 1968) (holding that alleged defects in special interrogatories could not be the basis for a new trial when counsel had not pointed out the alleged defect to the court).

In any event, under Section 433(b), Restatement 2d of Torts, it is provided:

> "(1) Except as stated in Subsections (2) and (3), the burden of proof that the tortious conduct of the defendant has caused the harm to the plaintiff is upon the plaintiff.
>
> (2) Where the tortious conduct of two or more actors has combined to bring about harm to the plaintiff, and one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor.
>
> (3) Where the conduct of two or more actors is tortious and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon such actor to prove that he has not caused the harm."

Section 433(b) has been adopted in Pennsylvania. *Sommers v. Hessler,* 227 Pa.Super. 41, 323 A.2d 17 (1974).

The jury apparently found that the Plaintiff had established by clear proof participation in violent acts by the Defendants Ashton and Short against Kerry Coal which were a substantial factor in directly causing damage. (Special Interrogatory 15) Defendants Ashton and Short cannot now argue that the verdict against them should be overturned because the damages were not apportioned, when it was their burden to convince the jury of the appropriateness of such apportionment and to propose applicable jury instructions to the Court. This they failed to do.

K. *Plaintiff's Pendent Claims Against Ashton and Short*

In their Amended Motion for Judgment Notwithstanding the Verdict or New Trial, Defendants Ashton and Short raised the ground that this Court abused its discretion in exercising pendent jurisdiction over Plaintiff's claims against them.

There was a substantial federal claim asserted against the International and the District. The alleged activities of the Individual Defendants, which formed the basis of the pendent claim, were an integral part of this substantial federal claim. Thus, consistent with *Aldinger v. Howard,* 427 U.S. 1, 96 S.Ct. 2413, 49 L.Ed.2d 276 (1976) and *UMW v. Gibbs,* 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966), we think the Court could exercise pendent jurisdiction over the state claims against the Individual Defendants arising out of a common nucleus of operative fact.

Furthermore, we think the Court properly exercised its discretion in retaining jurisdiction over the pendent state claims. Summary judgment was granted on the Plaintiff's federal claims against Ashton and Short on June 25, 1979, almost one and a half years after the filing of the Plaintiff's Complaint and just a couple of months prior to trial. A review of the record clearly discloses that Ashton and Short would have been called in this action against the other Defendants, even if the Court had dismissed the pendent claims against them. The same facts would have been introduced into evidence and in the interests of judicial economy and convenience, the Court was warranted in exercising its pendent jurisdiction. *Trensok Pipeline Co. v. Darks,* 565 F.2d 1150, 1154-55 (10th Cir. 1977) *cert. denied* 435 U.S. 1006 (1978). *See also Boudreaux v. Puckett,* 611 F.2d 1028 (5th Cir. 1980).

VIII. Conclusion

The Court has reviewed the Motions for Judgment Notwithstanding the Verdict and has concluded that the evidence was sufficient for the jury to reasonably find, without resort to prejudice or guess, that illegal picketing and violence in the coal fields in Western Pennsylvania was brought about by the International and the District, participated in by officials acting within the scope of their employment, and by the Individual Defendants as determined by the jury. Therefore, the Motions for Judgment Notwithstanding the Verdict will be denied.

We have also examined the Motions for New Trial alleging that the verdict was against the evidence, and in particular have concluded that the jury's verdict was not only permissible under the evidence, but was strongly indicated thereby. In other words, there was no seriously erroneous result when leaving to the jury the determination of the credibility of the testimony, what testimony was to be believed, and the inferences that it

should chose [sic] to deduce therefrom. Thus, the Motions of all Defendants for New Trial will be denied.

An appropriate Order will be entered.

DANIEL J. SNYDER, JR.
United States District Judge

Dated: March 25, 1980

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Appendix B

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

KERRY COAL COMPANY,
Plaintiff

v.

UNITED MINE WORKERS OF AMERICA, DISTRICT NO. 5 OF THE UNITED MINE WORKERS OF AMERICA, JERRY ASHTON, ESTEL TAYLOR, JAMES BEACHEM, BRIAN SHORT, JOHN DOE, RICHARD ROE, and all others acting in concert with them or otherwise participating with them or acting on their behalf,
Defendants

Civil Action No. 78-108

Order

AND NOW, to-wit, this 25th day of March, 1980, after hearing and due consideration of the briefs and arguments of counsel, and for the reasons set forth in the accompanying Opinion.

IT IS ORDERED, ADJUDGED AND DECREED that the Motions of All Defendants for Judgment Notwithstanding the Verdict and/or for New Trial be and the same are hereby denied.

DANIEL J. SNYDER, JR.
United States District Judge

cc: JOHN ELLIOTT, ESQ. and WILLIAM MILLER, ESQ.
LLOYD ENGLE, ESQ. and PAUL PUSKAR, ESQ.
MELVIN VATZ, ESQ.

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-1733/4/5/6

KERRY COAL COMPANY,
v.
UNITED MINE WORKERS OF AMERICA, ARNOLD MILLER, DISTRICT #5 of the United Mine Workers of America, LOUIS A. ANTAL, JERRY ASHTON, ESTEL TAYLOR, JAMES BEACHEM, BRIAN SHORT, JOHN DOE, RICHARD ROE, and all others acting in concert or otherwise participating with them or acting in their aid or behalf,

United Mine Workers of America,
Appellant in No. 80-1733

Estel Taylor,
Appellant in No. 80-1734

District 5, United Mine Workers of America,
Appellant in No. 80-1735

Jerry (Gary) Ashton, Brian Short, et al.
Appellants in No. 80-1736

(D.C. Civil No. 78-0108)

ON APPEAL IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued October 14, 1980

Before: GIBBONS, ROSENN, *Circuit Judges* and HANNUM* *District Judge*

(Opinion Filed January 8, 1981)

*Honorable John B. Hannum, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Appendix C.

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Appendix C.

Opinion of the Court

GIBBONS, *Circuit Judge.*

This is an appeal from an order denying defendants' motions for judgment notwithstanding the verdict or for a new trial. The successful plaintiff is Kerry Coal Company (Kerry Coal), a non-union coal producer. The defendants against which verdicts were returned are the United Mine Workers of America (the International), District No. 5 of the United Mine Workers of America (District 5), Estel Taylor, Brian Short, and Jerry Ashton. The trial court, using special verdict interrogatories, submitted three counts of a six count amended complaint to the jury. One of those counts, seeking punitive damages, resulted in a verdict for the defendants, and is not before us. On Count I, in which Kerry Coal sought damages pursuant to section 303 of the Labor Management Relations Act of 1947 for violations of section 8(b)(4) of that Act, the jury returned a verdict of $1,200,000 against the International and District 5.[1] On

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1. Section 303 provides:

(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 8(b)(4) of the National Labor Relations Act, as amended.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

29 U.S.C. §187 (1976).

Count IV, in which Kerry Coal sought damages under Pennsylvania law for interference with its business and contractual relationships, the jury returned a verdict in the same amount against the International, District 5, Taylor, Short, and Ashton. The district court refused to set these verdicts aside. We affirm.

Footnote *(continued)*

Section 8(b)(4) provides:

> (b) It shall be an unfair labor practice for a labor organization or its agents—
>
> (4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
>
> (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section:
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Pro-*

Appendix C.

I.

The Facts

Between December 6, 1977 and March 27, 1978 the International District 5, and the other local unions of the United Mine Workers engaged in an economic strike against members of the Bituminous Coal Operators' Association, with whom they had a collective bargaining

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Footnote *(continued)*

vided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing:

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter;

relationship. Kerry Coal, a coal producer whose facilities are located in the region for which District 5 has organizational responsibility, has never had such a bargaining relationship. During a part of the national bituminous coal strike Kerry Coal's facilities were closed down, and at one point partially destroyed. In this lawsuit Kerry Coal seeks to recover for the resulting damage to its business. Viewing all the evidence, and inferences drawn therefrom, in the light most favorable to Kerry Coal, the party with the verdict,[2] the jury could have found on liability as set out hereafter.

In November, 1977, prior to the commencement of its economic strike against those operators with which

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Footnote *(continued)*

> *Provided further,* That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

. . . 29 U.S.C. §158(b)(1)(1976).

2. *E.g.,* Chuy v. Philadelphia Eagles Football Club, 595 F.2d 1265, 1273 (3d Cir. 1979) (en banc), *citing* Kademenos v. Equitable Life Assurance Society, 513 F.2d 1073, 1074 (3d Cir. 1975).

it had a bargaining relationship, District 5 wrote to all other coal operators in its region, charging them with failure to meet area wage and benefit standards. These letters were sent without any knowledge of the actual wages and benefits paid by the non-union operators. Also in November, the District 5 president asked the International to send an International organizer to "survey" the non-union mines in the area. There was never, however, during the strike any attempt to organize Kerry Coal, or, so far as the record discloses, any other non-union coal operator in District 5's region. Two International organizers were sent to the area in November, one of them being Jay Kolenc. Kolenc, the second highest paid official of the International, was instructed by the International to stay on "present assignment," and remained in the District 5 region until January 21, 1978. While he was in the District 5 region Kolenc was paid a salary by the International which also reimbursed him for expenses incurred there. Vouchers for those expenses disclose that he and Thomas Pysell, former International Director of Organizing, appeared at non-union mines, and that he met frequently with District 5 Board members.

On November 30, 1977 the Executive Board of District 5 met and formally decided to conduct what it referred to as "informational" picketing at non-union mining operations during the anticipated strike. The Board authorized payment from District 5 funds to compensate picketers. Vouchers for such payments contained notations such as "made check on these strips in afternoon after having pickets shut them down" (App. at 1970) and "shut down trucking cos." (App. at 1966), from which the jury could reasonably infer that the picketing was not intended as area standards informational picket-

ing, but was for the purpose of interrupting production at the non-union mines. District 5 had a caravan of 16 roving pickets in the vicinity of Kerry Coal's operations. There was situs picketing at Abrosia Coal Company and Veon Coal Company, non-union operations near Kerry Coal, in early December. Having learned that the picketing at Veon Coal Company was accompanied by violence, Kerry Coal shut down its operations between December 13 and 20, 1977, but then resumed production.

On December 27, 1977 Vernon Kerry, president of the plaintiff, was threatened by defendant Ashton, and by a United Mine Workers member, Beachem, that if he did not shut down, they would bring 200 men to wreck his equipment, Beachem adding, "We can do this with one phone call." Ashton, who lived nearby, began situs picketing at Kerry Coal's railroad siding with a sign saying "UMW ON STRIKE — NO CONTRACT — NO WORK". For the picketing he was paid by District 5. Ashton also called UMW local president Lytle to ask for, and was promised, help. After this phone conversation Ashton, Beachem, and Lytle met with Kolenc. Between January 5 and 9 picketing at the rail siding was carried on 24 hours a day. The result was that trains coming to pick up coal did not violate the picket line, and left empty.

International organizer Kolenc was an encouraging presence at the picket lines at Kerry Coal's place of business on several occasions between January 5 and 9, when pickets threatened Kerry Coal's employees. Moreover, late in December Kolenc had arranged to put Ashton in touch with Taylor, the District 5 Board member in charge of the sub-district where Kerry Coal was located. Kolenc advised Ashton that he needed instruc-

tions about the picketing, and that someone would deliver them. At a later meeting among Ashton, Taylor, and Short, a past local president, Tayor asked Ashton to "scout" the Kerry Coal operation. Ashton did so, and Kolenc accompanied Ashton on the scouting trip. Ashton reported back to Taylor and Short that Kerry Coal was still operating, and a decision was made to institute 24 hour picketing. Kolenc was present at the meetings at which this decision was made and steps taken to implement it.

Short, who owned a Ram Charger vehicle, was observed by Vernon Kerry on the Kerry Coal property near the gas pumps. On this occasion Short threatened physical violence if Kerry Coal did not shut down its operations. During the picketing, roofing nails were strewn across the entrance to Kerry Coal's site, and the picketing was accompanied by intimidating gestures toward Kerry's truckers and employees.

On January 20, 1978, Taylor, Short, and two other union members drove past Kerry Coal's site and concluded that the company was still working. They then drove to Beaver Falls where they had a breakfast meeting with Kolenc. District 5 paid Short's and Taylor's expenses for the trip. Kolenc abruptly left Pennsylvania the next day. On January 22, 1978, between 3:00 a.m. and 8:00 a.m., extensive damage was done to Kerry Coal's equipment at its loading area. Vernon Kerry, arriving at the scene, observed in the newly fallen snow tire marks which he identified as having been made by Short's Ram Charger. He went in search of Short, encountering him in Library, Pennsylvania, where he accused Short of having been "seen last night." Short's only reply was, "I don't think so." Short then replaced

a virtually new set of tires on the Ram Charger. On January 26, after learning what Vernon Kerry had said to Short about someone having been seen wrecking the equipment, Taylor traveled to the area and made inquiries as to possible witnesses.

On January 25, 1978, twelve carloads of UMW pickets arrived at Kerry's coal tipple, and, standing shoulder to shoulder, completely blocked access to the premises. Vernon Kerry called the state police, but before their arrival two picketers, identifying themselves as United Mine Workers members, came into his office and told him to stop shipping industrial or electrical utility coal for the duration of the strike. Within five minutes an additional caravan of 80 cars cruised past the Kerry Coal site. Vernon Kerry, frightened, agreed to stop shipping industrial and electrical utility coal. When the police arrived the pickets had left, but the police told Vernon Kerry to get his men out of there, since they could not be protected if the caravan returned.

During the course of the strike coal trucks hauling Kerry coal were frequently followed and the drivers harassed. At one regular Kerry Coal customer, St. Joe Mineral Company, pickets threw rocks, damaging the trucks. After the delivery was completed, pickets swarmed at the St. Joe plant gates. Vernon Kerry, his drivers, and his trucks finally escaped under police escort. This delivery, on February 27, 1978, was the last requested by St. Joe for the duration of the strike. District 5 vouchers show payments to pickets at the St. Joe plant.

District 5 used its funds for the creation of a legal defense fund to be available to members such as Ash-

ton, Taylor, and Short for legal problems resulting from activity they might engage in during the strike.

The defendants offered evidence which would arguably support factual inferences more favorable to them. We emphasize that the foregoing summary is what the jury could, from the evidence, have found.

II.

The §8(b)(4) Charge

Both the International and District 5 contend that they are entitled to a judgment notwithstanding the verdict on the §8(b)(4) charge. Neither urges that the picketing, harassment of employees, or destruction of equipment which the jury could have found was lawful protected activity. It is clear that the activity complained of was not primary; that is, that it was aimed at preventing the railroads from handling Kerry coal, and at preventing Kerry from selling coal to industrial and electrical utility customers. Rather, both the International and District 5 contend that, assuming the threats, coercions and restraints occurred, they were not responsible.

Section 301(b) of the Labor Management Relations Act, 29 U.S.C. §185(b), provides that labor organizations shall be bound by the acts of their agents. Moreover "the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." 29 U.S.C. §185(e). The issue, as to both the International and District 5, is whether mindful of the agency principles referred to in section 301, a jury could find that they should be held liable. A separate analysis must be made for each.

Appendix C.

Carbon Fuel Co. v. UMW, 444 U.S. 212 (1979).

A. *District 5*

Before the strike began, District 5 sent letters to the non-union operators complaining of violations of area standards. A jury could find that these were pretexts for later picketing. District 5 authorized such picketing on November 30, 1977. The Executive Board of District 5 was intimately involved in the secondary activity directed against Kerry Coal. It is undisputed that Taylor, an Executive Board member, had authority to conduct picketing operations on behalf of the District, to approve and submit vouchers for picket travel and meal allowances, and to see to their payment. It is undisputed that Taylor authorized the establishment of a picket line at Kerry Coal between January 5 and 9, 1978, and that the District paid the pickets. Moreover, the District paid Ashton for earlier picketing, and paid Taylor and Short for the expenses incurred in their scouting expedition on January 20, 1978, a short time before Kerry Coal's equipment was sabotaged. There is, besides, the evidence of massive concert of action by stationary and roving pickets in the region of District 5's responsibility, and of similar concert of action by stationary pickets at the place of business of a Kerry Coal customer. There is ample evidence of meetings among officials of District 5 at which the picketing of Kerry Coal was discussed and set in motion. Short of a certified copy of a resolution by the full membership of District 5, it would be difficult to imagine evidence more strongly suggesting that Ashton, Short, and Taylor were acting as agents for District 5, carrying out its decision to engage in secondary activity directed at Kerry Coal. There was ample evidence justifying the submission of the agency issue to

the jury, and a judgment notwithstanding the verdict would be clearly improper.

District 5 also urges that because no Kerry Coal employees actually stopped working and no Kerry Coal customers actually ceased doing business with it, no section 8(b)(4) violation was shown. That contention flies in the face of the record evidence supporting the jury's award of damages, discussed hereafter. But more significantly, it is irrelevant. There is ample evidence of secondary coercive activity, and it is such activity that section 8(b)(4) proscribes.

B. *The International*

Liability of the International for the section 8(b)(4) violation depends upon the jury's assessment of the role of Kolenc. Relying on *Carbon Fuel Co. v. UMW*, 444 U.S. 212 (1979), the International urges that it cannot be held responsible for the acts of Ashton, Taylor, Short, or the other pickets absent evidence that it "instigated, supported, ratified, or encouraged" the picketing activities. That is undoubtedly the correct legal standard for measuring the International's liability. But when considering the propriety of a judgment notwithstanding the verdict, our task is to determine whether, considering all the evidence, a rational factfinder could infer such instigation, support, ratification, or encouragement. The task can be broken down further by asking (1) could the jury find that Kolenc instigated, supported, ratified, or encouraged the activity complained of, and (2) if so, was he acting for the International?

The answer to the first question is simple. Kolenc could be found to be not only an active participant, but

one of the prime movers in the activity directed against Kerry Coal. Kolenc put Ashton in touch with Taylor, scouted the Kerry Coal operation with Ashton, attended the meetings of District 5 officials at which the decision to picket Kerry Coal, and the implementation of that decision, were discussed, was present at the Kerry Coal site during the picketing, met with Taylor and Short after their January 20, 1978 scouting expedition, and left the area shortly after that meeting and immediately before Kerry Coal's equipment was vandalized.

But was Kolenc, while involved quite directly in the secondary activity against Kerry Coal, acting as an agent for the International? In November, about the same time District 5 was making the decision to engage in picketing of the non-union coal operators, its president asked the president of the International to send an organizer to "survey" those operators. The International sent Kolenc, its second highest paid official. The International suggests that the "survey" was for the innocent purpose of determining whether the non-union operators were doing a sufficiently large volume of business to be able to pay UMW standard wages and benefits. The jury did not have to credit this explanation, however, especially in the absence of any evidence of organizational activity in the District 5 region during the strike. The only evidence with respect to Kolenc's activity was that relating to his participation in the secondary activity directed against Kerry Coal. The International paid his salary during the time he was in the District 5 region, and paid his expense vouchers for traveling to the Kerry Coal situs. No organizational effort was made there. There is no record evidence that in the critical time period Kolenc submitted vouchers for organiza-

tional as distinct from secondary picketing activity. Finally, it can reasonably be inferred, and undoubtedly was, that the International and District 5 shared a common economic interest in interruption of the flow of non-union industrial and electrical utility coal while the strike continued.

While the evidence of Kolenc's status as an agent of the International is not as overwhelming as is that of the status of Ashton, Taylor, and Short as agents of District 5, we conclude that there was enough to go to the jury. From the collection of circumstances outlined above a reasonable factfinder could infer that the president of the International sent Kolenc to District 5 not for an organizational purpose, but in order to assist that district in interrupting the flow of non-union coal during the impending strike, and that Kolenc had authority to support and encourage, if not facilitate, Ashton's, Taylor's, and Short's actions against Kerry Coal. On this record a jury, one supposes, could have concluded that Kolenc was off on a frolic of his own. The jury did not do so, and it was not compelled to do so. The International's motion for judgment notwithstanding the verdict on the section 8(b)(4) claims was properly denied.

III.

The Pennsylvania Interference Charge

The International, District 5, and the three individual appellants, Ashton, Taylor, and Short, all contend that the court erred in failing to grant a judgment notwithstanding the verdict on Kerry Coal's Pennsylvania law claim of intentional interference with contractual relationships. Pennsylvania has adopted the standard of

the Restatement (Second) of Torts §766.[3] *See Franklin Music Co. v. American Broadcasting Cos.*, 616 F.2d 528 (3d Cir. 1979); *Adler, Barish, Daniels, Levin and Creskoff v. Epstein*, 482 Pa. 416, 393 A.2d 1175 (1978). The parties agree that in pursuing such a state law claim against members of a labor organization, the "clear proof" standard of proof of section 6 of the Norris-LaGuardia Act, 29 U.S.C. §106, applies. *UMW v. Gibbs*, 383 U.S. 715 (1966). The court instructed the jury that it must find by clear proof actual participation or actual authorization of violent acts. Thus the case comes before us in the posture that the jury was satisfied there was clear proof of such tortious interference. Once the jury has been properly charged as to the governing standard of proof, our role in assessing the propriety of a judgment notwithstanding the verdict is no different in such a case than in any other.

Our conclusion that the liability verdict against the International and District 5 for the section 8(b)(4) claim must stand makes any discussion of the tortious interference verdict against those defendants somewhat of an academic exercise. But since further review is at least possible, we note that the same evidence which sustains the verdict on the section 8(b)(4) claim sustains that based on Pennsylvania law. There was evidence of threats and intimidation against Kerry Coal's work-

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3. The Restatement (Second) of Torts provides:

> One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

Restatement (Second) of Torts §766.

force, and of violence to its equipment, directed at preventing Kerry Coal from fulfilling its contractual obligations to its customers. There was also evidence of similar intimidation and violence directed at Kerry Coal's truckers and at least one of its customers, St. Joe Mineral Company. The state law claim against the International and District 5 arose, moreover, out of the same operative facts as did the section 8(b)(4) claim. *UMW v. Gibbs,* 383 U.S. 715, 725 (1966). Thus the motion by these defendants for judgment notwithstanding the verdict on the tortious interference claim was properly denied.

The contentions of the individual defendants require a somewhat more specific treatment. They, too, urge that the evidence against them was insufficient as a matter of law. Extended discussion of that contention need not detain us. The jury could have found that Ashton, Taylor, and Short acted in concert and separately to interfere with Kerry Coal's delivery of coal.

Ashton, Taylor, and Short also contend, however, that the district court lacked subject matter jurisdiction of the state law claim asserted against them. They quite correctly point out that, as individual union members, they were not proper defendants in the section 303(b) suit against the International and District 5. *Atkinson v. Sinclair Refining Co.,* 370 U.S. 238 (1962). Since this was so, even though the state law claim arose out of the same operative facts as that for which section 303 conferred jurisdiction, they are, so they urge, at best pendent parties as to whom there exists no independent basis for federal jurisdiction. *See Aldinger v. Howard,* 427 U.S. 1 (1976).

The conclusion that section 303(b) jurisdiction is insufficient, absent some other federal question jurisdiction, to sustain a pendent state law claim against individual union members may be sound. The premise, however, that there was no other basis for federal question jurisdiction against the individual defendants is on this record unsound. Kerry Coal also pleaded a non-frivolous federal claim against the individual defendants under 42 U.S.C. §1985 as well as a federal claim that the individuals were as a matter of federal common law liable for exemplary and punitive damages for wanton and willful violations of section 8(b)(4). These claims against the defendants were of "sufficient substance to confer subject matter jurisdiction on the court." *Lentino v. Fringe Employee Plans, Inc.*, 611 F.2d 474, 478 (3d Cir. 1979). *See also Gagliardi v. Flint*, 564 F.2d 112 (3d Cir. 1977). Shortly before trial these claims against the individual defendants were dismissed on motion. The dismissal was not, however, final. The "[c]onstitutional power to adjudicate a pendent claim is ordinarily to be determined by reference to the pleadings, not on the facts as they may eventually be established." *Lentino v. Fringe Employee Plans, Inc., supra,* at 478, *citing Elberti v. Kunsman,* 376 F.2d 567, 568 (3d Cir. 1967). *See also UMW v. Gibbs,* 383 U.S. at 727.

Had the trial court, when it dismissed the federal law claims against the individual defendants, been presented with a motion for dismissal of the pendent state law claim against them, we suppose that such a dismissal would have been a permissible exercise of that court's discretion. No such motion was made. Instead the individual defendants gambled on trying the state law claim to a federal jury, and only long after the verdict raised the objection that it should have been dismissed in an

amended motion for a judgment notwithstanding the verdict. In such circumstances we cannot say that refusing to grant a motion for judgment notwithstanding the verdict was error. Indeed, since there was an independent basis for federal question jurisdiction over the individual defendants, and the jury returned a verdict, a discretionary dismissal at that point probably would violate the seventh amendment.

IV.

Damages

All defendants contend that the verdict of $1,200,000 in damages must be set aside. Ashton and Short argue that the award was the product of jury passion induced by the inflammatory remarks of plaintiff's counsel. We will consider that contention in dealing with the defendants' new trial motions. The common argument is that there is no evidentiary support for the award. The argument is twofold: that there is no proof of lost sales; and that if there is proof of lost sales, there is no proof that the defendants' activities caused the decline.

Kerry Coal's theory of damage was that as a nonunion coal producer of industrial and electrical utility coal operating during a national bituminous coal strike it could have sold at market price all the coal it could ship. Its accounting expert, Kilger [sic: Kilzer], determined maximum sales on the basis of shipments made during the month of February, when the defendants' activities were at a low level, and calculated the discrepancy when such activities were more intense. The expert then calculated profits lost on such lost sales. From Kerry Coal's books and records in evidence he aslo calculated

excess costs incurred for nonproductive labor when shipments were interrupted, lost interest income on profits on lost sales, and out of pocket expenses for items such as repair of damaged equipment, replacement of such equipment, and the cost of additional security guards. He included, finally, attorneys fees expended in obtaining a state court injunction against the defendants.

The defendants do not contend that the items of damage Kilger identified are not recoverable in a section 8(b)(4) action or in an action for tortious interference with business relationships. Rather, they contend, the evidence on lost profits was insufficient because it failed to establish lost sales to specific customers, and because it failed to tie such specific lost sales to their activities. We reject this contention.[4] The jury was presented with a reasonable basis from which it could find both the amount of Kerry Coal's lost sales during the national bituminous coal strike and the causal relationship between those lost sales and the defendants' activities. No more was required.

Finally, some defendants take issue with Kilger's calculations with respect to the amount of coal in Kerry Coal's stockpile at the beginning of the relevant period. This contention is at best a jury issue, and was so argued in the trial.

We conclude that the question of Kerry Coal's damage was properly submitted to the jury, and that there is a sufficient evidentiary basis for its verdict of $1,200,000.

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4. Kerry Coal points out that this contention was neither presented to nor considered by the trial court. The trial court did conclude, however, that there was sufficient evidence to sustain the damage award. Thus we have considered the contention on the assumption that in the court's view it may have been presented.

Appendix C.

V.

The New Trial Motion

The same defendants contend that various trial court rulings require a new trial. We turn to those contentions.

A. *The Wording of the Special Verdict Interrogatories*

The International and District 5 contend that the wording of the special verdict interrogatory on the section 8(b)(4) claim allowed the jury to find a violation of that statute without finding that the object was to force Kerry Coal to cease doing business with another person.[5] Our review of the record discloses, however, that the special verdict interrogatories were not objected to on this ground. Moreover the defendants do not contend that the court's jury instruction was in any way incorrect with respect to the elements of a section 8(b)(4) violation. The trial court did not err in rejecting this ground for a new trial.

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5. The challenged phrases are similar to those in special interrogatories 1 and 2:

> 1. Did the United Mine Workers of America (International) induce or encourage one or more employees of the Kerry Coal Company, or of the trucking companies hauling for Kerry Coal Company, or of the Railroad to refuse to process, transport, or handle Kerry coal?
>
> 2. Was an object of the aforementioned conduct by the International to require or force the employer, Kerry Coal Company, to cease doing business, or the trucking companies hauling Kerry coal, or the Railroad to cease processing, transporting, or handling Kerry coal?

Opinion of the district court, App. at 1598 n.1.

Appendix C.

B. *Denial of a Mistrial Motion*

During the plaintiff's closing argument to the jury Kerry Coal's counsel stated:

> The Veon Coal Company right next to the Kerry Coal Company was hit with violence on December the 12th. We closed down December the 13th. Short was at Veon. Taylor was at Veon. Do we have to — Then they destroy Veon's equipment, and he tells you there is no causal relationship between us closing on the 13th and what went on at Veon. (App. at 1575).

There was no contemporaneous objection or motion for a mistrial. Three months after the verdict the defendants first contended that this argument suggested that Short and Taylor, who were at Veon at the time referred to, were responsible for destruction of Veon equipment. There is no direct evidence that they were. Entirely aside from the untimeliness of the objection and mistrial motion, however, the quoted argument is not a ground for a mistrial. There is evidence that Veon's equipment was damaged, that Vernon Kerry heard of the damage by citizens band radio, and that Short and Taylor were at the Veon site when the damage occurred. It was certainly legitimate to argue to the jury that Vernon Kerry had reasonable cause to believe they may have been responsible, and he had reasonable cause to fear.

It is the quoted argument upon which Ashton and Short rely for the contention that the damage verdict was the result of jury passion. This argument is frivolous.

C. ***Evidentiary Rulings***

The defendants contend that the trial court erred in permitting Vernon Kerry to testify that Kerry Coal's employees were, following defendants' coercive actions, nervous and afraid. The trial court ruled, correctly, that Vernon Kerry's testimony was merely a shorthand report of his observations of employee reactions.

The defendants Ashton and Short also contend that the court improperly admitted evidence of the payment of their legal fees out of a fund which, the jury could find, originated with District 5. Admission of this evidence was a discretionary relevance ruling under Federal Rule of Evidence 403.

VI.

CONCLUSION

A judgment of $1,200,000 against an international union, one of its area subdivisions, and three individual members poses for us a serious matter requiring careful scrutiny. The respective roles of judge and jury, however, are not different in such a case than in any other civil action. Reviewing the record by the strict standard appropriate for a motion for judgment notwithstanding the verdict, we can find no justification for the grant of such a motion. Nor do we find any abuse of discretion in the trial court's ruling on the defendants' motion for a new trial. The judgment appealed from will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

Appendix D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

KERRY COAL COMPANY v. UNITED MINE WORKERS OF AMERICA, Petitioner	No. 80-1733
KERRY COAL COMPANY v. ESTEL TAYLOR, Petitioner	No. 80-1734
KERRY COAL COMPANY v. DISTRICT 5 OF THE UNITED MINE WORKERS OF AMERICA, Petitioner	No. 80-1735

Filed: January 20, 1981

Petition for Rehearing and Suggestion for Rehearing In Banc

NOW COME, United Mine Workers of America ("UMWA"), Petitioner in Case No. 80-1733, Estel Taylor ("Taylor"), Petitioner in Case No. 80-1734, and District 5 of the United Mine Workers of America ("District 5"), Petitioner in Case No. 80-1735, pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure, and petition the Court for rehearing, and suggest that the above styled consolidated appeals be reheard before the Court in Banc.

Counsel for Petitioners certifies, as required by Rule 22 of this Court, that they believe, based on a reasoned and studied professional judgment, that the

panel decision misconstrues the record facts and is contrary to decisions of the United States Court of Appeals for the Third Circuit and decisions of the Supreme Court of the United States, and that consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court and consistency with the decisions of the Supreme Court of the United States; to wit, the panel's decision is contrary to the decision of this Court in *Sunderland v. Pittsburgh & Lake Erie R.R.*, 344 F.2d 960 (3rd Cir., 1965); *Slater v. Erie-Lackawanna R.R. Co.*, 300 F. Supp. 1 (W.D. Pa., 1968), *Affd.* 411 F.2d 1015 (3rd Cir., 1969); and *William B. Tanner Co., v. WIOO, Inc.*, 528 F.2d 262 (3rd Cir., 1975) *and* is contrary to the decisions of the Supreme Court of the United States in *Carbon Fuel v. U.M.W.A.*, 444 U.S. 212 (1979); *U.M.W.A. v. Coronado Coal Co.*, 259 U.S. 344 (1922); *Coronado Coal Co. v. U.M.W.A.*, 268 U.S. 295 (1925); and *U.M.W.A. v. Gibbs*, 383 U.S. 715 (1966).

Counsel further certifies that this appeal involves questions of exceptional importance; to wit, if the panel decision is permitted to stand it will further the existing discrepancies between the decisions of this Court and those pertaining to similar matters in other Circuits; e.g. *Buckeye Power, Inc. v. Utility Workers*, 607 F.2d 759 (6th Cir., 1979); and *Steelworkers v. Lorain*, 616 F.2d 919 (6th Cir., 1980) and will relegate Petitioners, and others similarly situated, to the obligation of different standards of conduct depending upon the geographical area involved and, thereby, lack of due process of law.

The following is submitted in support of this Petition:

Appendix D.

MISAPPREHENSION OF FACTS

On January 8, 1981, a panel of this Court, in an Opinion written by Circuit Judge Gibbons and joined in by Circuit Judge Rosenn and District Judge John B. Hannum, decided the above appeals.

In view of the possibility of further review, it is deemed necessary that the misstatement of facts in the panel's decision be considered and corrected.

At page 6, and again at page 12, of the slip opinion, the panel characterizes Kolenc as the UMWA's "second highest paid official." As is clear from the record (2424a-2431a), at least nine (9) other "officials" were more highly paid and, further, the only record of Kolenc's status was that of employee, not an "official" of the UMWA.

At page 7 of the slip opinion, the panel states "Ashton also called UMW local president Lytle. . . ." While this tracks the language on page 6 of Appellee's Brief, it does not track the record. There is no evidence that Lytle was a "local president."

Also at page 7 of the slip opinion, the panel states "Kolenc was an encouraging presence at the picket lines at Kerry Coal's place of business on several occasions between January 5 and 9, when pickets threatened Kerry Coal's employees." While this is a composite of statements on pages 7, 14 and 15 of Appellee's Brief, it is almost totally unsupported by the record. There is no evidence that Kolenc encouraged the pickets but, in fact was recognized as having no authority regarding the pickets (664a). *At most,* Kolenc was at the site of the picketting [sic] for short periods "a couple of times"

(542a, 588a, 624a, 669a), not "several," and there is no evidence that he was there "when pickets threatened Kerry Coal's employees," if, in fact, they did.

At page 8 of the slip opinion, the panel states "At a later meeting . . . Taylor asked Ashton to 'scout' the Kerry Coal operation. Ashton did so and Kolenc accompanied Ashton on the scouting trip." This is a partial tracking of language on page 14 of Appellee's Brief not supported by the record. Taylor, called as a witness by Appellee, testified that he never asked Ashton to "scout" Kerry Coal's operation (717a) and there is no evidence that Kolenc accompanied Ashton at any time to "scout" Kerry Coal's operation. This contention is made again by the panel on page 12 of the slip opinion.

At page 8, and again at page 12, of the slip opinion, the panel states that Kolenc attended meetings of District 5 officials at which the decision to picket Kerry Coal, and the implementation of that decision, were discussed. There is no evidence that Kolenc attended any meetings of District 5 officials or discussed any such subjects with them.

At page 8 of the slip opinion, the panel states ". . . Short threatened physical violence *if Kerry Coal did not shut down its operation.*" (Italics added.) Typically, this tracks language on page 26 of Appellee's Brief contrary to the record. No less authority than Vernon Kerry testified on the subject at 484a as follows:

> Q Now, he said he wanted to beat the shit out of you. Why? Because you were following him?
>
> A I'm not sure why.

Q You're not sure why. He did accuse you of following him around, all around the area, is that correct?

A We accused each other.

Q Okay. The tone of the conversation wasn't very friendly, was it?

A No.

At page 8 of the slip opinion, the panel states "Kolenc abruptly left Pennsylvania the next day," (January 21, 1978) and again, at page 12, paraphrases that contention with ominous innuendo. This comes close but does not quite track the language at pages 14 and 15 of Appellee's Brief where Appellee states that he left "conveniently and mysteriously." There was nothing abrupt or mysterious about his leaving on January 21, though convenient it may have been. That was a Saturday and if the panel had taken the time to look at the evidence in this regard (2390a, 2392a, 2394a, 2396a, and 2398a) it would have seen that each weekend or every other weekend he travelled to and from his residence in Brilliant, Ohio.

At page 8 of the slip opinion, the panel states "On January 26, . . . Taylor traveled to the area *and made inquiries as to possible witnesses.*" (Italics added.) The italicized clause came from page 8 of Appellee's Brief and not from any record evidence. In fact, Taylor, a witness called as for cross examination by Appellee testified that this was not true (see page 762 of Trial Transcript) and counsel for Appellee so knew when he wrote Appellee's Brief because he put the question.

At page 9 of the slip opinion, the panel states "During the course of the strike coal trucks hauling Kerry

coal were *frequently* followed and the drivers harassed." (Italics added.) The record contains a singular incident when any trucks hauling Kerry coal were followed; to wit, February 27, 1978, and there is no evidence that the UMWA had anything to do with that.

At page 9 of the slip opinion, the panel states "District 5 used its funds for the creation of a legal defense fund. . . ." All of the evidence regarding the "legal defense fund" establishes that it was funded by contributions from other unions, organizations and persons, not by any monies of District 5 (1873a-1881a).

At page 12 of the slip opinion, the panel states "Kolenc . . . attended the meetings of District 5 officials at which the decision to picket Kerry Coal and the implementation of that decision were discussed. . . ." There is absolutely no evidence that Kolenc attended any "meetings of District 5 officials" or that he was involved in any decision to picket Kerry Coal or in any implementation of any such decision. In fact, it is established by clear, uncontradicted evidence that Kolenc did not make any decisions about any picketing, did not direct any picketing, and had no authority to direct any (662a-665a).

The panel, at page 13 of the slip opinion, endorses an unwarranted inference that the UMWA and District 5 shared a common economic interest in the interruption of the flow of non-union coal during the strike. Sam Church testified (1223-4a) that the UMWA did not have an economic interest in such interruption but, in fact, had an economic interest in it not being interrupted. It may be said that a jury need not credit this testimony, though uncontradicted, but a failure to credit does not

bestow the power to make a diametrically opposite inference without any evidential base. In this record there was no such evidential base as to the UMWA.

At page 15 of the slip opinion, the panel states "There was evidence of threats and intimidation against Kerry Coal's workforce, and of violence to its equipment, directed at preventing Kerry Coal from fulfilling its contractual obligations to its customers. There was also evidence of similar intimidation and violence directed at Kerry Coal's truckers and at least one of its customers, St. Joe Mineral Company." The record is totally devoid of any such evidence as to the UMWA and, most particularly, any *clear proof* of actual participation or authorization of violent acts or ratification after actual knowledge thereof. Further, it takes quite a stretch of inference, certainly not clear proof to find such evidence in this record as to District 5 and Taylor. In fact the exact opposite was established by Vernon Kerry himself (465a-468a).

At page 17 of the slip opinion there occurs a complete perversion of the evidence and probably the most important misapprehension. There the panel states "Kerry Coal's theory of damages was that . . . (during the strike) . . . it could have sold at market price all the coal it could *ship*." (Italics added.) The word in evidence was not "ship," it was "produce" (1084a, 1087a). The importance of this is discussed hereinafter under Misapprehension of Law.

At page 17 of the slip opinion, the panel states ". . . he (the expert) also calculated excess costs incurred for nonproductive labor *when shipments were interrupted.*" That is incorrect. He did it for the entire

strike period, not just *when shipments were interrupted* (1014a, 1937a). That is one of the many complaints by Petitioners as to Kerry Coal's "proof" of the fact of damage.

At page 18 of the slip opinion, the panel states that Petitioners "contend the evidence on lost profits was insufficient because it failed to establish lost sales to specific customers and because it failed to tie such specific lost sales to their activities." That is only partially accurate. Petitioner's end contention is that Kerry Coal failed to show that it had *any* customers or orders to which it could have sold more coal than it did sell in December, 1977, and January and March, 1978, or any price at which it could have sold any such coal in those months. (See page 45 of Appellants' Brief at No. 80-1733.)

At page 19 of the slip opinion, the panel states "that the special verdict interrogatories were not objected to on this ground" (the lack of "cease doing business *with any other person*"). They were. See pages 2419-2424 of the Trial Transcript.

At page 19 of the slip opinion, the panel stated as to the prejudicial remarks of Appellees' counsel in closing argument, "There was no contemporaneous objection or motion for a mistrial." There was. See 1575a-1577a.

At page 20 of the slip opinion, the panel states "There is evidence that Veon's equipment was damaged, . . . and that Short and Taylor were at the Veon site when the damage occurred." There is neither. Vernon Kerry testified (335a) that "Roving pickets were on my competitor's (not identified as Veon) job and done several thousand dollars damage. I received notice of that

by radio and by phone calls." That went in over objection, not to prove that it occurred but only to show Kerry's frame of mind (335-36a). There is no evidence to show that Short and Taylor were at the site when the damage occurred, if it ever did.

MISAPPREHENSION OF LAW

This Court, in *Tanner, supra,* held that there was no evidence that Tanner had potential customers for the radio spots or of a price at which the spots could have been sold if there were customers and, in the absence of such "hard evidence," any attempted lost profits calculation would be pure speculation. While the panel, in the instant appeals did not see fit to consider or even mention that case the same premises apply in this case; to wit, there was no showing that Kerry had any customers, other than those which it sold coal to in December, 1977, and January and March, 1978. But there is more. Here, the total premise for the damage methodology is that Kerry "could have sold all the coal it could have *produced.*" There was no evidence as to how much it could have produced. A fortiori, there was no basis of the potential quantity of available saleable coal to which the expert could apply his factors of profit, etc. The fact-finder was left to total speculation as to whether Kerry could have produced the amount of coal on which its expert calculated the damages and the expert's chosen "base month" of February, 1978 furnishes no guide, because Kerry sold 19,000 tons more than it was able to produce in that uninterrupted month. The panel held this vacuum sufficient.

The Supreme Court, in *Gibbs, supra,* held that the "clear proof" in §6 of Norris-LaGuardia meant "clear,

unequivocal and convincing proof." There was no such proof in this case as to participation, authorization or ratification after knowledge of violent acts as to Petitioners. Here, Kerry relied upon baseless inference, emotional appeal and innuendo. The panel credited these baseless inferences.

The Supreme Court, in *Carbon Fuel, supra,* and both *Coronado Coal* cases, *supra,* held that the common law of agency and doctrine of *respondeat superior* applied to labor organizations in cases of this nature, albeit that §§ 301 and 303 of Taft-Hartley did not exist at the time of the *Coronado* cases. The evidence here discloses no authority in Kolenc to do any of the things on behalf of the UMWA which the panel infers he did and Taylor testified that Kolenc had no authority in District 5, which testimony, even if not credited cannot form the basis for a contrary inference. Taylor had express authority *only* to set up informational picketing. Express authority cannot be inferred and apparent authority can be inferred only from the conduct of the principal, not of the agent. See *Tanner, supra.*

The panel ignored the holding of this Court in *Sunderland, supra,* by crediting the testimony of Vernon Kerry that his employees were "nervous and afraid," without more, as "merely a shorthand report of his observations." It was a shorthand report of his self-serving conclusions, with no observation evidence. None of the Federal Rules of Evidence, however they may have been relaxed on the classical rules of exclusion, read to such mischief.

The panel, at page 13 of the slip opinion, contends that the circumstances would warrant an inference that

Kolenc was sent into District 5 with authority to assist in interrupting the flow of coal and authority to encourage and facilitate actions against Kerry Coal in that regard. This is bootstrapping and flies in the face of this Court's decision in *Tanner, supra.* Authority cannot be inferred from the conduct of the agent. If it could, most of the law of agency could be discarded and we could take the simplistic approach that because an agent did any act he had authority to do it.

As regards the authority of Kolenc, the panel did not consider the decision in *Slater, supra,* that a party is bound by the testimony of an adverse witness called by the party unless the testimony is contradicted, is inherently improbable or was based on a mere guess. Taylor was an adverse party called by Appellee and testified (662a-665a) that Kolenc did not make any decisions about picketing, did not direct any picketing and had no authority to direct anything in District 5. Taylor's testimony on these matters was not contradicted and, obviously was not inherently improbable or based on a mere guess.

The panel decision is discrepant with the Sixth Circuit decisions in *Buckeye Power, supra,* and *Steelworkers v. Lorain, supra,* as well as decisions in other Circuits. Such inconsistencies ought not to be extended.

Respectfully submitted,

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Appendix E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-1733/4/5/6

KERRY COAL COMPANY

v.

UNITED MINE WORKERS OF AMERICA, ARNOLD MILLER, DISTRICT #5 of the United Mine Workers of America, LOUIS A. ANTAL, JERRY ASHTON, ESTEL TAYLOR, JAMES BEACHEM, BRIAN SHORT, JOHN DUE [sic], RICHARD ROE, and all others acting in concert or otherwise participating with them or acting in their aid or behalf,

United Mine Workers of America,
Appellants in No. 80-1733

Estel Taylor,
Appellant in No. 80-1734

District 5, United Mine Workers of America
Appellant in No. 80-1735

Jerry (Gary) Ashton, Brian Short, et al.,
Appellants in No. 80-1736

(D.C. Civil No. 78-0108)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued: October 14, 1980

Before: GIBBONS and ROSENN, *Circuit Judges* and HANNUM, *District Judge**

(Opinion Filed: January 8, 1981)

*Hon. John B. Hannum, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Appendix E.

Order Amending Opinion

The slip opinion in the above matter is hereby amended as follows:

Cover Page

"ON APPEAL IN THE UNITED STATES DISTRICT COURT" is amended to read "ON APPEAL FROM THE UNITED STATES DISTRICT COURT"

"Before: GIBBONS, ROSENN, *Circuit Judges*" is amended to read "Before: GIBBONS and ROSENN, *Circuit Judges*"

Page 5 [page 63a herein]

Note 1, lines 11-24, [lines 1-17 herein] *"Provided further,"* and material following should immediately follow on line 10 [page 62a, note 1, line 31 herein] after "subchapter:"

Note 1, line 24 [line 17 herein], "distribution;" is amended to read "distribution; . . ."

Note 1, line 25 [line 18 herein], delete ellipsis and move citation out to left margin.

Page 9 [page 67a herein]

In line 7 [line 12 herein], "industrial or electrical" is amended to read "industrial and electrical"

Page 10 [page 68a herein]

In Part II, heading, "The §8(b)(4) Charge" is amended to read "The Section 8(b)(4) Charge"

First paragraph, line 3, "§8(b)(4) charge" is amended to read "Section 8(b)(4) charge"

Second paragraph, line 2, after "§185(b)," and before the word "provides" insert "to which section 303 refers,"

Page 17 [page 76a herein]

Part IV, second paragraph

Line 1: "damage was that as a non—" is amended to read "damage was that as a non-"

Line 14 [page 77a, line 3 herein]: "out of pocket" is amended to read "out-of-pocket"

Page 18 [page 78a herein]

In Part V, line 6, "special verdict interrogatory" is amended to read "special verdict interrogatories"

JOHN J. GIBBONS

Circuit Judge

Dated: January 28, 1981

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit

Appendix F

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 80-1733/4/5/6

KERRY COAL COMPANY

v.

UNITED MINE WORKERS OF AMERICA, ARNOLD MILLER, DISTRICT # 5 of the United Mine Workers of America, LOUIS A. ANTAL, JERRY ASHTON, ESTEL TAYLOR, JAMES BEACHEM, BRIAN SHORT, JOHN DOE, RICHARD DOE, and all others acting in concert or otherwise participating with them or acting in their aid or behalf,

United Mine Workers of America,
Appellant in No. 80-1733

Estel Taylor,
Appellant in No. 80-1734

District 5, United Mine Workers of America,
Appellant in No. 80-1735

Jerry (Gary) Ashton, Brian Short, et al,
Appellants in No. 80-1736

(D. C. Civil No. 78-0108)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued: October 14, 1980

Before: GIBBONS and ROSENN, *Circuit Judges,*
and HANNUM,* *District Judge*

(Opinion filed: January 8, 1981)

---

*Honorable John B. Hannum, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Appendix F.

Order Amending Opinion

The court's opinion in the above matter is hereby amended as follows:

Page 6, line 18 [page 64a, line 14 herein]

"paid official" is amended to read "paid organizer"

Page 7 [page 65a herein], first full paragraph, line 10

"Ashton also called UMW local president Lytle" is amended to read "Ashton also called UMW member Lytle"

Page 12, fourth line from the bottom [page 71a, first full paragraph, line 8 herein]

"second highest paid official" is amended to read "second highest paid organizer"

Page 19 [page 79a herein], Part B, immediately following quote

"There was no contemporaneous objection or motion for a mistrial. Three months after the verdict the defendants first contended" is amended to read "Defendants did not object to plaintiff's argument in the motion for new trial. Three months after the verdict they contended"

Appendix F.

Page 20, lines 8-9 [page 79a, lines 22-23 herein]

"and that Short and Taylor were at the Veon site when the damager occurred." is amended to read "and evidence from which a jury could infer that Short and Taylor were at the Veon site when the damage occurred."

JOHN J. GIBBONS

Circuit Judge

Dated: February 5, 1981

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit

Appendix G

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. S. 80-1733/4/5/6

KERRY COAL COMPANY

v.

UNITED MINE WORKERS OF AMERICA,
ARNOLD MILLER,
DISTRICT # 5 of the United Mine Workers of America,
LOUIS A. ANTAL,
JERRY ASHTON,
ESTEL TAYLOR,
JAMES BEACHEM,
BRIAN SHORT,
JOHN DOE,
RICHARD ROE,
and all others acting in concert or otherwise participating with them or acting in their aid or behalf,
United Mine Workers of America, Appellant in No. 80-1733
Estel Taylor, Appellant in No. 80-1734
District 5, United Mine Workers of America, Appellant in No. 80-1735
Jerry (Gary) Ashton, Brian Short, et al, Appellants in No. 80-1736

(D. C. Civil No. 78-0108)

Sur Petition for Rehearing

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges*

Appendix G.

The petition for rehearing filed by United Mine Workers of America, Estel Taylor and United Mine Workers of America, Jerry (Gary) Ashton and Brian Short in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

JOHN J. GIBBONS

Judge

Dated: February 9, 1981

Office-Supreme Court, U.S.
FILED
JUN 8 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1891

IN THE

Supreme Court of the United States

October Term, 1980

UNITED MINE WORKERS OF AMERICA, and DISTRICT NO. 5 OF THE UNITED MINE WORKERS OF AMERICA and ESTEL TAYLOR,

Petitioners,

v.

KERRY COAL COMPANY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Only one question need be reached to determine whether the instant Petition should be denied:

Should this Court review a case in which none of the requirements of Rule 17 of the Rules of the Supreme Court are present, which can be sustained upon adequate and independent state law grounds, and which only raises factual contentions, primarily going to credibility, which were unanimously rejected by the jury, by the trial court in reviewing the jury's finding of facts and by the Court of Appeals?

The instant Petition raises a total of three grounds for writ of certiorari all resolved by the jury and the Courts below in favor of the Respondent and none of which can be answered unless the Court answers the foregoing question in the affirmative. In that event the additional questions presented for review are as follows:

1. Was there a complete absence of probative facts to support the jury's finding that Petitioner United Mine Workers of America (the "International") violated Section 8(b)(4)(i) and (ii) of the National Labor Relations Act?

2. Was there a complete absence of probative facts to support the jury's finding that an object of Petitioner United Mine Workers of America, District 5's ("District 5") actions was to force Respondent to cease doing business with other persons?

3. Was there a complete absence of probative facts to support the jury's verdict on damages on both the federal and pendent state law claims against Petitioners International, District 5 and Estel Taylor?

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COUNTERSTATEMENT OF THE CASE

A. Procedural History.

On January 31, 1978, Plaintiff-Respondent Kerry Coal Company ("Kerry Coal" or "Respondent") commenced a civil action pursuant to Section 303 of the Labor-Management Relations Act ("LMRA"), 29 U. S. C. § 187, alleging, *inter alia,* that Defendants-Petitioners International and District 5 violated Section 8(b)(4) of the National Labor Relations Act ("NLRA"), as amended, 29 U. S. C. § 158(b)(4), and that Defendants-Petitioners International, District 5, and Taylor, and Defendants Gary Ashton ("Ashton") and Brian Short ("Short") tortiously interfered with Kerry Coal's contractual and business relationships during the United Mine Workers' ("U. M. W.") nationwide work stoppage from December 6, 1977 through March 27, 1978. The claim for tortious interference was pendent to Respondent's federal claim and was governed by Pennsylvania law.

Trial commenced on September 17, 1979. On October 10, 1979, after 16 days of trial, the case was submitted to the jury. On October 11, the jury returned a verdict of $1,200,000 in compensatory damages against Petitioners International, District 5 and Taylor and Defendants Ashton and Short. The jury's Special Interrogatories found the International and District 5 liable for violating Section 8(b)(4) and found Petitioners International, District 5 and Taylor and Defendants Short and Ashton liable under Pennsylvania law for interfering with Kerry Coal's business and contractual relationships. [2a-6a] [1]

1. Citations to pages 1a *et seq.* are citations to the Appendix to the Instant Petition.

On October 19, 1979, Respondents International, District 5 and Taylor filed motions for judgment n.o.v. and a new trial. On January 14, 1980, they filed a single brief in support of their post trial motions and a "Supplemental Motion for a New Trial" asserting four grounds not previously raised and waived.

On February 8, 1980, argument was held on Petitioners' post trial motions. On March 25, 1980, the Trial Court, per the late Honorable Daniel J. Snyder, Jr., in a written opinion denied Petitioners' motions for judgment n.o.v. and new trial. [Appendix A to Petition for Certiorari] An Appeal to the United States Court of Appeals for the Third Circuit followed.

Argument was held on October 14, 1980 and on January 8, 1981 the Court of Appeals, per the Honorable John J. Gibbons, Circuit Judge, held that the trial court did not err in denying Petitioners' post-trial motions and there was sufficient evidence to support the jury's verdict as to all Defendants on both the Federal and pendent claims. [Appendix C to Petition for Certiorari] The Third Circuit unanimously denied Petitioners' Motions for Rehearing and Rehearing *En Banc* on February 9, 1981. [Appendix G to Petition for Certiorari] On May 8, 1981, 88 days after the denial of the Motion for Rehearing and Rehearing *En Banc,* Petitioners International, District 5 and Taylor filed the instant Petition.

B. Statement of the Facts.

Respondent Kerry Coal was at all relevant times an independent, non-union surface coal mining company shipping its coal by rail and truck to industrial and domestic customers in Pennsylvania and Ohio. [7a] Kerry Coal had no contract with Petitioners. Petitioners admitted they were not attempting to organize Kerry Coal. Kerry Coal was operating five mine sites in Butler, Beaver and

Lawrence Counties, Pennsylvania, located within District 5. [7a] District 5's President Antal assigned Petitioner Taylor, a District 5 Executive Board Member, to coordinate strike activity in the area which included Respondent Kerry Coal's mines. [7a]

Petitioners conducted a pervasive campaign of violence and intimidation against independent, non-U. M. W. coal operations in District 5 during the 1977-78 strike. Respondent Kerry Coal was a specific target of this campaign. As a smokescreen for this illegal activity, prior to the start of the strike District 5 President Antal wrote indiscriminately to all non-U. M. W. mines in District 5 charging that they failed to meet area wage and benefit standards. In fact, Antal admitted at trial that he knew nothing about Respondent's wages and benefits, and admitted having no specific knowledge of the wages and benefits of any of the over 100 independent, non-U. M. W. mines to which he wrote. [9a]

At this same time, Antal asked International President Miller to send former International Director of Organizing Thomas Pysell to Western Pennsylvania. [7a] Pysell was then joined by International Organizer Jay Kolenc. Kolenc's expense vouchers show that, beginning on November 25, 1977, he and Pysell appeared at independent, non-union mines. Kolenc was a harbinger of violence. Wherever he went trouble followed. Kolenc remained in the area until January 21, 1978, allegedly leaving Pennsylvania just hours before Respondent Kerry Coal's heavy mining equipment was destroyed. [8a]

From the time Kolenc arrived in Pennsylvania, he was in constant contact with District 5 Board Members. [8a] Kolenc's expense vouchers show several meetings with District 5 officers. [8a] The telephone records of Petitioner Taylor, who Antal placed in charge, show many calls to Kolenc, beginning on the strike's first day, December 6, 1977. [8a]

President Antal called a November 30, 1977 meeting of the District 5 Executive Board to prepare strike guidelines for "picketing" at independent, non-union mines. [9a] District 5 paid these "pickets" $42,833 to shut down non-union operations and stop the flow of non-union coal to the market. District 5 Executive Board members authorized and paid vouchers for such violent "picket" activities as stopping coal trucks, following trucks, shutting down strip mines and forcing consumers of coal to cease using the product. [64a]

In a transparent attempt to avoid implicating District 5, Antal appointed his crony, former U. M. W. local President Michael Encrapera, to set up the District 5 Coal Miners Legal Defense Fund to pay the criminal fines and attorneys of arrested U. M. W. members. Checks made out on their face to the International, District 5 and the District 5 Strike Fund were diverted to Encrapera's fund. [16a-18a] President Antal and his District 5 Executive Board exercised dominion and control over this money. [20a, 21a] Encrapera was their rubber stamp, repeatedly ordered by Antal and other District 5 Executive Board Members to "take care of" the criminal fines and legal fees of arrested District 5 members. [20a, 21a]

Although Kerry Coal had nothing to do with the U. M. W.'s economic strike against union mines, it was immediately attacked by Petitioners. Between December 6 and 12, 1977, Vernon Kerry, Respondent's President, observed roving U. M. W. pickets around his mines. [10a] District 5 vouchers admit that Respondent Taylor and Defendant Short were in "roving bands" of pickets near Kerry Coal. On December 7, the very first day of the strike, Taylor and Short led a 5-car caravan of 16 roving pickets on a 222-mile trip near Kerry Coal. [10a-11a] On the morning of December 12, Mr. Kerry received C. B. radio reports of violence at a neighboring non-union competi-

tor's mine site, the Veon mine. Both Defendant Short and Respondent Taylor were at Veon. At trial, both Short and Taylor admitted awareness of the violence at Veon. Fearing for the lives of his employees and the safety of his property, Mr. Kerry ceased operations from December 13 to December 20, 1977. [11a]

In response to several calls for coal, Respondent Kerry Coal resumed mining operations on December 20, 1977. [11a] However, Petitioners' acts of intimidation began again. Roofing nails were strewn across the entrances of Kerry Coal's sites. [11a] On December 27, 1977, Defendant Ashton and his friend, U. M. W. member Beachem, immediately after threatening Kerry Coal's employees and truck drivers, threatened Mr. Kerry that if he did not shut down, they would bring in 200 men to wreck his equipment. Beachem added, "we can do this with one phone call." [11a] Ashton, who lived next to the Franklin Township site, where Kerry Coal's equipment was destroyed, disrupted Kerry Coal's shipments to its customers by picketing Kerry's railroad crossing with a District 5 economic strike sign—"UMW ON STRIKE—NO CONTRACT—NO WORK." Whenever a train came to pick up coal, it was forced to leave empty. [11a] Respondent Taylor then authorized and District 5 paid for all of Ashton's activities since the strike began, including his stopping the trains at Respondent's rail siding.

Ashton wanted to completely shut down Kerry Coal's operations. On the very same day he and Beachem threatened Mr. Kerry that they would close Kerry Coal and destroy its equipment with a single phone call, Ashton called U. M. W. member Lytle, who promised help. [12a] Ashton, Beachem and Lytle then met with International Organizer Kolenc. Kolenc went to Ashton's home next to Kerry Coal's mine site and advised him how to shut down Kerry Coal. [12a, 65a] Kolenc and Ash-

ton then surveyed Kerry Coal's mining operation. [66a] Kolenc directed District 5 Executive Board Member Taylor to call Ashton that same day to finalize the picketing. [65a] Taylor did as ordered and arranged a second meeting near Kerry Coal's Franklin Township mine site.

Kolenc, Ashton, Taylor, Short and other District 5 members met and finalized the picket line at Kerry Coal's Franklin Township rail siding, where Ashton had previously stopped trains and where Kerry Coal's equipment was later destroyed. Because Kerry Coal normally shipped 80% of its coal by rail, Kerry Coal's railroad siding was the most vulnerable site. [11a]

International Organizer Kolenc participated in the attack on Kerry Coal and was in the words of the Third Circuit "an encouraging presence." [65a] After the meeting with Taylor, Kolenc and Ashton "scouted" Kerry Coal's operations. [66a] Kolenc was so enthusiastic that on the first day of picketing he arrived first, even before Taylor. Defendant Ashton and Respondent Taylor admitted seeing Kolenc at the picket line several times. Kolenc threatened Kerry Coal's employees, encouraged his fellow picketers and served as their spokesman, even negotiating with the police on their behalf. Even after the picket line was withdrawn, Kolenc remained in constant contact with Respondent Taylor, District 5's coordinator of picketing at Kerry Coal's operations.

On January 20, 1978, just one day before Kerry Coal's heavy mining equipment was destroyed, Taylor, Short and other District 5 members returned to Kerry Coal's mine site. [66a] The admitted sole purpose of their 130 mile trip, paid for by District 5, was to see if Kerry Coal was operating. They then immediately met with Kolenc to plan the destruction of Kerry Coal's equipment. [13a, 66a] After meeting with Taylor, Short and the others, International Organizer Kolenc mysteriously and "abruptly" checked out the Beaver Falls Holiday Inn and

allegedly left Pennsylvania just hours before Kerry Coal's equipment was destroyed. [66a] At 7:18 P. M. on the night of January 21, 1977, telephone records show that Taylor called Ashton at Ashton's home overlooking Kerry Coal's site. [36a]

In the early morning hours of January 22, 1978, Kerry Coal's heavy mining equipment was destroyed. When Mr. Kerry was called to the site that morning, he observed extensive damage to his new drag line, three bulldozers, a pan scraper and a fuel truck. Gauges and controls were smashed and air cleaners broken. Windows on the equipment were broken, the turbochargers smashed, fuel lines cut and two-way radios destroyed. Lines on the fuel tanks were cut allowing fuel to run out. Metal bars were driven by sledges through radiators. Gauges and controls were smashed and air cleaners broken. In addition, foreign substances, such as sand and mothballs were placed in fuel tanks of the equipment. Radiators were completely filled with sand and dirt. [13a-14a] At 9:26 A. M., on the morning of January 21, 1977, Taylor once again called Ashton at home. Telephone records prove that their conversation lasted six minutes, although at trial both denied the phone call was ever made. [36a-37a]

Mr. Kerry, an experienced hunter and tracker, observed distinctive tire tread marks in the snow which he identified as coming from Defendant Short's Dodge Ramcharger. Mr. Kerry recognized Short's vehicle's tire tracks, having seen them while Short was previously at Kerry Coal. When Mr. Kerry accused Short of "being seen last night," Short significantly did not deny it. He merely rejoined, "I don't think so." Short then immediately replaced a virtually new set of tires on this vehicle. [14a, 37a] On January 26, after learning from Short that Mr. Kerry said they had been seen, Taylor travelled 130 miles

to the area of Kerry Coal to check with a "farmer" whether he and his cohorts had indeed been seen. [15a-16a]

Respondents' attack on Kerry Coal did not end with the destruction of its equipment. On January 25, 1978, twelve carloads of U. M. W. pickets mobbed and blockaded Kerry Coal's tipple. Mr. Kerry called the State Police, but before their arrival, men came into Kerry Coal's office, identified themselves as U. M. W. members, and ordered Mr. Kerry to stop shipping industrial or electrical utility coal. Mr. Kerry was frightened and agreed to do so:

> It was a wise decision on my part because within five minutes there was a caravan came past my office in a show of force. There were some 80 cars in the caravan in addition to the cars that were already at my site.

[15a]

When the State Police arrived, the "pickets" had gone. The police told Mr. Kerry that they could not protect them and before the caravan comes back he should get his employees out of there. Kerry ordered his men to leave.

Kerry Coal's trucks were continually followed and harassed throughout the strike. When Kerry Coal attempted delivery to its customer, St. Joe Mineral Company ("St. Joe"), U. M. W. members swarmed around the trucks and plant gates, threw rocks and damaged Kerry Coal's trucks. Mr. Kerry and his drivers barely escaped under police escort. St. Joe then stopped orders from Kerry Coal. Petitioners attempted to destroy evidence and conceal from the jury their illegal activity against Kerry by crossing out "St. Joes" on vouchers paid by District 5 to its members. [15a, 67a]

Kerry Coal suffered damages to its business and property as a result of Petitioners' actions. Kerry Coal was forced to close its mining operations in December, 1977, because of nearby U. M. W. violence. Petitioner District 5 members intimidated Kerry's employees; stopped trains transporting Kerry's coal and prevented Kerry from shipping its coal to utilities; intimidated truckers; hampered truck shipments by throwing roofing nails across the entrance to Kerry's Franklin Township site; caused several of Kerry's retail customers to stop their orders; destroyed Kerry's mining equipment; and forced Kerry to incur expenditures for security guards, lost man-hours (production employees taken away from normal assignments and assigned to repair and guard equipment); and obtaining a state court injunction to prevent further U. M. W. illegality.

The Petitioners' reign of terror was effective. The strike was a period of tremendous sales opportunities for Kerry Coal. With unionized mines not functioning, demand for coal far exceeded supply. Mr. Kerry testified that from the very beginning of the strike, "my phone was ringing off the hook." However, Petitioners' illegal actions forced shutdowns, stopped trains from picking up coal, and deterred trucks from transporting Kerry's coal. Moreover, the message was effectively delivered to customers, such as St. Joe, that if they bought Respondent's coal, they would face U. M. W. violence. Kerry Coal was unable to meet the demand for coal, solely because of Petitioners' interference.

REASONS FOR DENYING THE WRIT

The Court of Appeals' decision, affirming the jury's verdict on both the federal and pendent state claims and the trial court's extensive post-trial review of the sufficiency of the evidence, follows long-standing and controlling precedent, does not conflict with decisions of this Court or any Court of Appeals, does not present any issue worthy of review by this Court and may be sustained upon adequate and independent state law grounds.

A. There Are Adequate and Independent State Law Grounds to Sustain the Judgment.

Petitioners International, District 5 and Taylor seek to have this Court review the decision of Third Circuit affirming the trial court's denial of Petitioners' post-trial motions. Even if Petitioners were to prevail on their arguments on the federal claim, the decision of the Third Circuit holding there was sufficient evidence to support the jury's verdict on the state law claim of tortious interference would stand on adequate and independent state law grounds.

This Court will not and does not review judgments of the state's highest courts which may be supported by adequate and independent state law grounds. *See Herb v. Pitcairn*, 324 U. S. 117, 125 (1954); 12 J. W. Moore, *Moore's Federal Practice* § 511.01, at 8-65 (2d ed. 1980). Moreover, it is entirely inconsistent with Rule 17 of the Rules of the Supreme Court to review the decision of the Third Circuit that under Pennsylvania law there was adequate evidence to support the jury's verdict on the pendent claim of tortious interference with business relations.

Accordingly, for this reason alone the instant Petition must be denied.

B. The Third Circuit Correctly Decided That There Was Sufficient Evidence to Support the Jury's Finding of Liability Against Petitioner International.

Petitioner International's contention that the Third Circuit's finding of sufficient evidence to sustain the verdict against it is in conflict with the decisions of other Courts of Appeal and this Court is based on inaccurate, incomplete and misleading statement of the record below. It is nothing more than an attempt to restate the same arguments which were rejected by the jury and the two courts below in carefully reviewing the jury's findings of fact.[2]

The jury's finding that the International through its agent, Jay Kolenc, "authorized, ratified and participated" in the interference with Respondent's business and property is fully supported by the record.

Petitioner's suggestion that the decision of the Third Circuit is in conflict with this Court's decision in *Carbon Fuel Co. v. UMW*, 444 U. S. 212 (1979) and the decisions of the Sixth Circuit in *Buckeye Power, Inc. v. Utility Workers Union*, 607 F. 2d 759 (6th Cir. 1979), and *Steelworkers v. Lorain*, 616 F. 2d 919 (6th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3863 (U. S., May 19, 1981) is patently incorrect.

In *Carbon Fuel Co. v. UMW, supra*, this Court held that where there is no evidence presented in the district court that the International Union instigated, supported, ratified or encouraged an illegal work stoppage, it could not be held liable for breach of a collective bargaining agreement under section 301 of the LMRA, 29 U. S. C. § 185. *Carbon Fuel Co. v. UMW, supra* at 218. This finding is contrasted with the overwhelming evidence of

2. There has been a long-standing practice of this Court not to review findings of fact which have been reviewed by two courts. *See, e.g., Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U. S. 271, 275 (1949), *adhered to on reh.*, 339 U. S. 605 (1950).

Kolenc's extensive participation in and leadership of Petitioners' illegal activity directed at Respondent Kerry Coal.

Similarly inapposite are *Buckeye Power, Inc. v. Utility Workers Union*, 607 F. 2d 759 (6th Cir. 1979) and *Steelworkers v. Lorain*, 616 F. 2d 919 (6th Cir. 1980).

In *Buckeye*, the Sixth Circuit affirmed the district court's refusal to find a national labor union liable under section 303 of the LMRA, 29 U. S. C. § 187, because there was no evidence that the union authorized, encouraged or ratified illegal activity. *Buckeye Power, Inc. v. Utility Workers Union, supra* at 761.

Similarly, in *Steelworkers v. Lorain, supra*, the Sixth Circuit refused to hold a labor organization liable under section 301 of the LMRA, 30 U. S. C. § 185, for an alleged breach of a no strike clause in a collective bargaining agreement. The *Lorain* court held that there was no implied obligation on the part of the labor organization to take whatever actions were necessary to procure a termination of the illegal work stoppage. The court held that for a labor organization to be held liable it must be shown that the illegal activity was ratified, authorized or participated in by the labor organization. The *Lorain* court also held that the district court's conclusion that the union's failure to act to end the work stoppage or to discipline the strikers and to discuss the substance of the employees' grievances which precipitated the illegal strike was clearly erroneous. 616 F. 2d at 922-23.

The actions of the unions in *Buckeye* and *Lorain* are in sharp contrast with the activities of International Organizer Jay Kolenc instigating, participating and encouraging the illegal activity directed at Kerry Coal. In its review of the record the district court found that Kolenc provided the "know-how" to plan and implement Petitioners' campaign of interference with Respondent Kerry

Coal. Petitioner International ignores the fact that the jury was correctly instructed on the burden of proof for each count. Petitioner International did not and does not object to any statement of the law by either the trial court or Third Circuit or the issues of the appropriate burden of proof or the requirements for finding the existence and scope of an agency relationship.[3] Rather its sole contention is that this Court should supercede the jury by reviewing the evidence; making judgments on the credibility of witnesses; and sitting as the finder of fact. This is clearly not the proper role of this Court or any appellate court.

C. There Was Sufficient Evidence to Support the Jury's Finding That an Object of Petitioner District 5's Activity Was Forcing Respondent to Cease Doing Business With Other Persons.

Petitioner District 5 argues that both the Third Circuit and trial court did not consider whether there was sufficient evidence that District 5 had as an object of its conduct the type of interference prohibited by Section 8 (b)(4) of the NLRA, 29 U. S. C. § 158(b)(4). It should

3. In its instant Petition the International erroneously contends it would need actual knowledge of the acts of its agent Kolenc to be liable under Section 303 of the LMRA, 29 U. S. C. § 187. This is, of course, wholly inconsistent with Section 301(b) and (e) of the LMRA, 29 U. S. C. § 185(b) and (e) which provides in pertinent part:

> (b) Any labor organization/shall be bound by the acts of its agents. . . .
>
> . . .
>
> (e) For the purposes of this section in determining whether any person is acting as an "agent" of another for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

be noted that Petitioner does not contend that such evidence was lacking, only that the issue was not addressed by the court below.

This contention is easily disposed of.

First, District 5 has belatedly raised this issue for the first time. It neither raised in its post-trial motions or on its appeal to the Third Circuit the sufficiency of the evidence to support the jury's finding that the object of its activity was to interfere with Respondent. It is a matter of black-letter law that this Court will not consider contentions which have not been raised below. *See Singleton v. Wulff*, 428 U. S. 106, 120 (1976); *Youakim v. Miller*, 425 U. S. 231, 234 (1976) (Per Curiam), *California v. Taylor*, 353 U. S. 553, 557 n. 2 (1957); *Lawn v. United States*, 355 U. S. 339, 362-63 n. 16 (1958).

Even if Petitioner District 5 raised this issue below, it is wholly without merit.

The jury specifically found an illegal object in its Answer to the Special Interrogatories:

> 5. Was an object of the aforementioned conduct by District No. 5 to require or force the employer, Kerry Coal Company, to cease doing business, or the trucking companies hauling Kerry Coal, or the Railroad to cease processing, transporting, or handling Kerry Coal?
>
> Answer Yes.
>
> 11. Were these acts of United Mine Workers, District No. 5, done with an object, purpose, or intent to require or to force Kerry Coal Company to cease doing business with any other person?
>
> Answer Yes.

[3a-4a]

The jury's finding was supported by the record. District 5's activity was not an "antiseptic information

campaign" as Petitioner District 5 disingenously suggests. "Pickets" used the U. M. A.'s traditional economic strike "No Contract—No Work" signs and were not picketing to publicize area wages. Around-the-clock "pickets" at a rail siding disrupted Respondent's coal shipments. Equipment was destroyed to force Respondent to cease operations. District 5 paid pickets to stop trucking and shut down strip mines. The District Court in reviewing the evidence found:

> The overwhelming evidence however indicated that the District, with know-how provided by the International Organizers, planned and implemented the campaign to interfere with the production and sale of non-union coal during the strike, including Kerry coal, and that Kerry Coal's damages resulted therefrom.

[34a]

The paucity of Petitioner District 5's argument that Respondent failed to adduce evidence of an illegal object was conclusively demonstrated by the Third Circuit:

> On November 30, 1977 the Executive Board of District 5 met and formally decided to conduct what it referred to as "informational" picketing at non-union mining operations during the anticipated strike. The Board authorized payment from District 5 funds to compensate picketers. *Vouchers for such payments contained such notations such as "made check on these strips in the afternoon after having pickets shut them down" (App. at 1970) and "Shut down trucking cos."* (App. at 1966), from which the jury could infer that the picketing was not intended as area standards informational picketing, but was for the purpose of interrupting production at the non-union mines. (Emphasis added)

There was overwhelming evidence to support the jury's finding that District 5's activities were for the purpose of shutting off the supply of non-union coal during the work stoppage. Petitioner District 5's argument that there was insufficient evidence to support this inescapable conclusion is wholly without support.

D. The Decision of the Third Circuit With Respect to Damages on the Federal and Pendent Claims Is Consistent With Its Previous Decisions and Does Not Merit Review by This Court.

The last issue raised by Respondents is an alleged inconsistency between the ruling of the Third Circuit in its decision with respect to damages between the instant case and its decision in *William B. Tanner Co. v. WIOO, Inc.*, 528 F. 2d 262 (3d Cir. 1975). The Petitioners would seek to have this court review not only the Third Circuit's decision upholding the adequacy of the evidence to sustain the jury's verdict on damages on the federal count but also on the pendent count under Pennsylvania law.[4]

Petitioners' contention that the jury's damage award could not be sustained under *Tanner* was rejected by both the Third Circuit and the trial court.

Petitioner's reliance upon *William B. Tanner Co. v. WIOO, Inc.*, 528 F. 2d 262 (3d Cir. 1975) is totally misplaced. *Tanner* is readily distinguishable from the instant case on its facts. In *Tanner*, the Third Circuit rejected the

4. This Court lacks jurisdiction to review the final judgment of a state's highest court which may be supported by adequate and independent state law grounds. *See Herb v. Pitcairn*, 324 U. S. 117, 125 (1954); 12 J. W. Moore, *Moore's Federal Practice*, § 511.01, at 8-65 (2d ed. 1980). Similarly, it is wholly inconsistent with Supreme Court Rule 17 for this Court to review the decision of the Third Circuit with respect to proper measure of damages under Pennsylvania law.

damages because there was no evidence in the record on which a computation of damages could be based. In the instant case, Respondent clearly established the value of its lost sales and profits by relying on its actual sales history and business records in evidence during a base period within the strike.[5] For this period, Respondent's actual sales tonnage and actual sales prices were utilized in the calculations. Given the testimony concerning the high demand for coal throughout the strike and Kerry Coal's use of its actual sales data in computing lost profits, *Tanner* is entirely inapposite.

The evidence or damages was succinctly summarized by the Third Circuit:

> "The jury was presented with a reasonable basis from which it could find both the amount of Kerry Coal's lost sales during the national bituminous coal strike and the causal relationship between those lost sales and defendants' activities . . . ."

[77a]

Petitioners' attempt to have this Court exercise its power of supervision because the courts below rejected their distorted reading of the *Tanner* decision. However, their argument ignores the evidence in the record and only reargues factual contentions which were made to and rejected by the jury.

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5. Respondent based its damage calculations upon a method approved by courts in suits under Section 303 of the LMRA, 29 U. S. C. § 187. *See, e.g., Blue Diamond Coal Co. v. UMW*, 436 F. 2d 551 (6th Cir. 1970), *cert. denied*, 402 U. S. 930 (1971). Petitioners did not challenge below or here the methodology employed by Respondent or that the categories of damages—lost profits, lost man hours, lost interest income or out-of-pocket expenses—were compensable. *See Kerry Coal Co. v. UMW*, 637 F. 2d 957, 966 (3d Cir. 1981). [77a]

CONCLUSION

The instant Petition improperly seeks to have this Court review factual determinations made by a jury which were carefully reviewed by both the trial court and the Third Circuit and make judgments as to credibility of witnesses. The Petition further seeks to have this Court review determinations of state law made by the Third Circuit. None of these grounds are appropriate for review by the Supreme Court under Supreme Court Rule 17. Accordingly, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Appendix.

STATUTES INVOLVED

Relevant Section of the National Labor Relations Act. Section 8(b)(4), 29 U. S. C. § 158(b)(4).

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative

of such employees under the provisions of section 159 of this title: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further,* That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or prod-

ucts are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

Relevant Sections of the Labor Management Relations Act of 1947.
Section 301(b) and (e), 29 U. S. C. § 185(b) and (e).

* * *

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

* * *

(e) For the purpose of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

Section 303, 29 U. S. C. § 187.

(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

Supreme Court Rule 17. Considerations Governing Review on Certiorari.

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

.2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, and of any other court whose judgments are reviewable by law on writ of certiorari.

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No. 80-1891

IN THE

Supreme Court of the United States

October Term, 1980

UNITED MINE WORKERS OF AMERICA, and DISTRICT NO. 5 OF THE UNITED MINE WORKERS OF AMERICA and ESTEL TAYLOR
Petitioners

vs

KERRY COAL COMPANY
Respondent

PETITIONERS' REPLY BRIEF

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QUESTIONS PRESENTED

1. Should the Court deny review on the grounds that there may have been adequate and independent state grounds for the decision of the Court of Appeals for the Third Circuit?

2. Has Respondent correctly construed Section 301(b) and (e) of the Labor-Management Relations Act in light of this Court's decision in *Carbon Fuel Co. v. United Mine Workers?*

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION

On May 8, 1981, Petitioners United Mine Workers of America ("the International"), District 5 of the United Mine Workers of America ("the District"), and Estel ("Larry") Taylor filed with this Court a Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit. Thereafter, Respondent Kerry Coal Company timely filed a Brief in Opposition. This Reply Brief is filed by Petitioners pursuant to Rule 22.5 of the Rules of the Supreme Court, and addresses two (2) arguments first raised in Respondent's Brief in Opposition.

A. The Court Should Not Deny Review on the Grounds That There May Have Been Adequate and Independent State Grounds for the Decision of the Court of Appeals for the Third Circuit

The authorities cited by Respondent in parts A and D of its argument[1] enunciate a limitation on this Court's jurisdiction to review a judgment of a state's highest court, where review is sought under Section 1257 of the Judicial Code (28 U.S.C. §1257).[2] Under this doctrine,

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1. Respondent's Brief in Opposition to Petition for a Writ of Certiorari, page 10, and page 16, note 4.

2. §1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

the Court will decline review of a state court's opinion rendered on both federal and state law issues, if the opinion would stand on adequate and independent state law grounds. *Herb v. Pitcairn,* 324 U.S. 117, 125 (1954). Here, Petitioners seek review pursuant to Section 1254, subsection (1) of the Judicial Code (28 U.S.C. §1254(1)),[3] which grants the Supreme Court discretionary jurisdiction over cases in the Federal Courts of Appeals. There exists no doctrine parallel to that articulated in *Herb v. Pitcairn, supra,* which would similarly limit this Court's review of federal appellate court decisions. Indeed, Respondent cites no authority for its novel proposition that this Court should deny review of a decision of a *federal* appellate court because the decision ostensibly rests on independent state grounds.

Footnote 2 (Continued)

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

For purposes of this section, the term "highest court of a state" includes the District of Columbia Court of Appeals.

3. §1254. Court of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State

Moreover, even if the existence of independent state grounds for the Court of Appeals' decision would influence this Court's determination whether to exercise its permissive jurisdiction in this case, this aspect of Respondent's challenge must still fail. The state law grounds asserted—*i.e.*, that an employee of the International and an employee of District 5 acted in violation of state tort law, and therefore, that in doing so they acted as the agents of their respective labor organizations—were supported by no more than an *inference* erroneously permitted by the Court of Appeals and charitably, though wrongly, characterized as "evidence" sufficient to support the jury's verdict. The Court's attention is invited to the Petition for Writ of Certiorari filed herein[4] for a discussion of the legitimacy of an inference of International or District liability under these circumstances. It is this critical inference, contrary to the prior rulings of this Court, upon which the "independent state law grounds" of the Court of Appeals' opinion rely. If the inference is disallowed by this Court, the Court of Appeals' holding as to the Inter-

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Footnote 3 (Continued)

statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented.

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

4. Petitioner's Argument A, pages 8-15.

national's and District's liability under state tort law must also fall. Thus, there exist no adequate and independent state law grounds to urge against the exercise of this Court's power of review.

B. Respondent Has Misconstrued Section 301(b) and (e) of the Labor-Management Relations Act

In its Brief in Opposition, page 13, note 3, Respondent misconstrues Section 301(b) and (e) of the Labor-Management Relations Act, 29 U.S.C. §185(b) and (e).[5] Respondent argues that, under these two subsections, a labor organization need not have actual knowledge of its agent's acts to be liable for them. Yet subsection (e) contemplates the situation where a labor organization has authorized its agent to pursue a general course of conduct, and then attempts to disclaim liability for specific acts of its agent consistent with that general course of conduct. Thus, had positive, substantial evidence[6] established, for example, that the International *directed* its employee to shut down nonunion mines by force and in carrying out that general directive the employee poured sand into the fuel tank of Respondent's truck, the International could not escape

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5. Subsection (b) provides:

> (b) Any labor organization . . . shall be bound by the acts of its agents. . . .

Subsection (e) provides:

> (e) For the purposes of this section in determining whether any person is acting as an "agent" of another for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

6. For authorities setting forth this requirement, *see,* Petition for Certiorari, page 11, regarding the Section 8(b)(4) violation.

liability under Section 301 by claiming it had not specifically authorized that employee to pour sand into Respondent's fuel tank.

In contrast, subsection (e) was not intended to raise the inference, relied upon by Respondent and the Third Circuit, that where an employee of a labor organization is found to have engaged in the conduct complained of, he *must* have been acting as an agent of the labor organization. To read subsection (e) as authorizing such an inference is to deny effect to this Court's decision in *Carbon Fuel Co. v. United Mine Workers,* 444 U.S. 212 (1979), holding that a labor organization's responsibility under Section 301 for acts of others must be determined by the common law rule of agency. Yet the Court of Appeals upheld the jury's finding that the International and the District were liable, where the only support therefor was an inference that because the individuals connected by circumstantial evidence with illegal activity were *employed* by those labor organizations, the individuals must have been acting at the direction and with the authority of those organizations.[7] This

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7. Petitioners do not seek this Court's review of the jury's finding that Jay Kolenc and Larry Taylor, respectively the International and District 5 employees concerned, were involved inferentially in illegal activity. What is significant vis-a-vis this Petition is that the only evidence of their connection with illegal activity was circumstantial, and that, from such evidence, the jury inferred their liability. That the *inference* of International and District liability was founded on an *inference* of individual illegality compounds the impropriety of the Court of Appeals' ruling, and poses an even greater threat to the vitality of *Carbon Fuel* than if Kolenc's and Taylor's involvement had been established by substantial direct evidence. *See,* note 6, *supra.*

is not simply a question of sufficiency of evidence to uphold a lower court. Rather, it is a question of what proof of a labor organization's relation to illegal activity is required to establish liability. To permit the Court of Appeals' inference of the principal's liability to stand would be tantamount to a rule of a labor organization's absolute liability for all acts of its agents, be they employees or, as in *Carbon Fuel, supra,* local unions, without requiring proof by substantial evidence that the agents acted within the scope of their authority. Therefore, Respondent's construction of Section 301(b) and (e) of the Labor-Management Relations Act should be rejected.

CONCLUSION

Respondent has misapplied the standard for Supreme Court review of decisions of a state's highest court, and has urged the Court to deny Petitioners' request for review on this inapplicable ground. Moreover, Respondent has urged an interpretation of the federal labor laws which is contrary to a recent opinion of this Court. Therefore, Respondent has failed to proffer any cogent argument justifying denial of the Petition for Writ of Certiorari filed herein.

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